Supreme Court, U.S.
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99 930 DEC 0 1 1999
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No. _____

In The

# Supreme Court of the United States

EARL MORRIS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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November 30, 1999

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139 pp

## QUESTIONS PRESENTED

1. Whether The Sixth Circuit's Decision Directly Conflicts With Precedent Of This Court That Establishes that the Jury Should Not Consider the Evidence Against Ms. Ward That Would Not Have Been Admissible Against The Petitioner Had He Been Tried Alone.

2. Whether The Sixth Circuit Opinion Which Recognizes That Material Government Witnesses Committed Perjury, And One Openly Suborned Perjury Of Other Government Witnesses Did Not Violate Petitioner's Right To A Fair Trial And Due Process Is Clearly Error Of The Gravest Magnitude.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT OF CERTIORARI ..... 6

A. The Sixth Circuit's Decision Directly Conflicts With Precedent Of This Court That Establishes That The Jury Should Not Consider The Evidence Introduced Against Ms. Ward That Would Not Have Been Admissible Against The Petitioner Had He Been Tried Alone ..... 6

B. The Sixth Circuit Opinion, Which Recognizes That Material Government Witnesses Committed Perjury, And One Openly Suborned Perjury Of Other Government Witnesses Did Not Violate Petitioner's Right To A Fair Trial And Due Process Is Clearly Error Of The Gravest Magnitude ..... 10

CONCLUSION ..... 13

APPENDIX ..... App. 1

# TABLE OF AUTHORITIES

Page

CASES

*Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) ..... 5, 12

*Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) ..... 5, 13

*United States v. Odom*, 13 F.3d 949 (6th Cir.), *cert. denied*, 114 S.Ct. 1859, and *cert denied*, 115 S.Ct. 116 (1994) ..... 6

*United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993) ..... 10

*United States v. Tarradino*, 846 F.2d 1384 (D.C. Cir. 1988) ..... 10

*United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) ..... 12

*Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) ..... 7, 9

CONSTITUTIONS

U.S. Const. amend. V ..... 1, 5, 10, 13

U.S. Const. amend. VI ..... 2

U.S. Const. amend. XIV ..... 5

STATUTES

28 U.S.C. § 1254(1) ..... 1

RULES

403 Fed. R. Evid. ..... 3

404(b), Fed. R. Evid. ..... 3, 7

8, Fed. R. Crim. P. ..... 7

14, Fed. R. Crim. P. ..... 2

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Earl Morris, respectfully prays that a Writ of Certiorari issue to review the final judgment entered by the United States Court of Appeals for the Sixth Circuit on September 7, 1999.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at ___ F.3d ___ (6th Cir. 1999), but the decision is reproduced in the appendix hereto.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 7, 1999. This petition for writ of certiorari is filed within ninety (90) days of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Fifth Amendment*:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Sixth Amendment:*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*Rule 14, Federal Rules Of Criminal Procedure:*

If it appears that a Defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for a trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

## STATEMENT OF THE CASE

On April 23, 1997, Petitioner was convicted on nine (9) counts and granted a judgment of acquittal on two (2) counts; counts seven (7) and eleven (11). Petitioner was sentenced to three hundred and sixty (360) months on counts 1, 4, 5, 6, 8, 9 and 10, all of which were to run concurrent one with the other, and a forfeiture of one million ($1,000,000.00) dollars was returned by the jury. On count sixteen (16) of the indictment, Petitioner was sentenced to two hundred and forty (240) months which was to run concurrent with the three hundred and sixty (360) months sentence previously meted out. (R. 418).[1]

Prior to trial on April 8, 1997, Petitioner moved for a severance based upon the trial court's ruling that the government could introduce the prior conviction and the judgment and committal order of Cheryl Ward out of the Northern District of Kentucky. (App. 114-123) This judgment and committal order had a notation by the district judge describing Ms. Ward as a "big time drug dealer." (App. 122-123) Since the government painted the Petitioner as Ward's alter ego, there was no way to cure the prejudicial effect. However, the court did give a curative instruction under Rule 404(b), Federal Rules of Evidence, but as the dissent points out, the trial court absolutely failed to conduct any analysis under Rule 403, Federal Rules of Evidence. Thus, no attempt was made to determine if the prejudicial effect outweighed the probative value of the evidence. Petitioner moved for a severance at

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[1] Docket entries will be referred to as "R" and references to the appendix will be "App."

the trial when the Court allowed the government to introduce Ms. Ward's judgment and committal order. (App. 26-28) The trial court denied the motion. (*Id.*) The denial of a severance was also raised post-trial by the Petitioner in a Motion for New Trial (R. 314). The trial court overruled and denied the Motion for New Trial on May 2, 1997 (R. 347).

During the course of the trial, two key government witnesses, Norvell Terry and Bobby Holder, perjured themselves on material issues which affected the outcome of the trial. Mr. Terry went further than committing perjury to earn his 5.K.1.1 motion from the government, as it came to light that Mr. Terry attempted to intimidate Mr. Holder into giving false testimony about another co-defendant Michael Smith, in order that Mr. Terry's false statement to the government and subsequent false testimony would be corroborated. (R. 347) Petitioner moved for a mistrial when Mr. Terry's perjury and attempted subornation of perjury came to light. (App. 50) Petitioner addressed the issue in his Motion for New Trial and it too was overruled and denied. (R. 347)

In addressing the perjury of Terry and Holder and subornation of perjury by Terry, the lead opinion was rather cavalier in its approach to the issue stating:

> "The government argues that, while there is some evidence that Terry perjured himself regarding collateral issues, his perjury was brought to the jury by the Defendants themselves when all three Defendants were given virtually unlimited latitude to cross-examine Terry and other witnesses regarding collateral matters about which Terry lied." (App. 15-16)

The Sixth Circuit went on to state:

> "We know of no rule that stands for the proposition that, even with full cross-examination, the introduction of perjured testimony per se warrants a new trial."

This cavalier attitude basically gives the government a blank check to introduce perjured testimony and disregards precedent of this Court going back to *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). As well as he overriding admonition that the government and its representatives have a duty to do justice and not to just garner convictions, *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Finally, the Petitioner strongly premised that if none of these errors standing alone established reversible error that the cumulative effect of all these errors denied him due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### A. The Sixth Circuit's Decision Directly Conflicts With Precedent Of This Court That Establishes That The Jury Should Not Consider The Evidence Against Ms. Ward That Would Not Have Been Admissible Against The Petitioner Had He Been Tried Alone.

#### 1. The Refusal To Grant Petitioner A Severance.

On direct appeal to the Court of Appeals for the Sixth Circuit, the Petitioner advanced the position that the government's theory in this case was that Cheryl Ward was Petitioner's alter ego. In that vein, any evidence introduced against Ms. Ward inured to the detriment of the Petitioner. But more importantly because of the standing requirement of this Court, Petitioner was unable to confront the evidence offered against Ms. Ward by way of a comment from the sentencing judge from the Northern District of Kentucky that Ms. Ward was a "big time drug dealer." Likewise, the province of the jury was invaded, because the jury had to have concluded that the Petitioner was also a "big time drug dealer." Because of the admission of this evidence and the theory put forward by the government, the document might as well have said, "Earl Morris is also a big time drug dealer." Petitioner had no way to confront the evidence and the jury was clearly robbed of its ability to make "a reliable judgment about guilt or innocence of Appellant." *United States v. Odom*, 13 F.3d 949, 958 (6th Cir.), *cert. denied*, 114 S.Ct. 1859, and *cert. denied*, 115 S.Ct. 116 (1994).

This Court addressed the issue of severance in *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). In interpreting Rule 8, Fed. R. Crim. P., this Court set forth the following guidelines:

> We believe that, where defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. *Such a risk might occur when evidence that the jury should not consider against a defendant and would not be admissible if a defendant were tried alone is admitted against a co-defendant. For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty.* . . . The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instruction, often will suffice to cure any risk of prejudice. [citations omitted] (emphasis supplied) 506 U.S. at 539.

Petitioner clearly fell within the ambit of the broad holding of *Zafiro, supra*. The Sixth Circuit relies upon the trial court's instruction that the jury should only consider the evidence against Ward alone. (App. 14) This grasp for a straw comes after the panel acknowledges that the trial judge erred in his instruction to the jury and did not correctly identify which of the 404(b), Fed. R. Evid. Exceptions were applicable. As the Court noted:

> The district court simply listed all of the factors named in the rule for which evidence of unchanged misconduct *might* be admissible in *any* case, even though most of them were not applicable to this case. For instance, Ward's defense was not that she mistakenly thought that she was selling powdered sugar instead of cocaine, thereby justifying Rule 404(b) evidence to prove 'absence of mistake or accident,' and no issue was raised in this case suggesting that 'identity' was at issue. Similarly, the jurors could not have possibly understood how the prior convictions would have been relevant to prove 'motive' or 'opportunity' or 'preparation' or 'plan' or 'and so forth,' as instructed by the Court. (emphasis in the original)

Thus, the Sixth Circuit recognizes that the limiting instruction denied Ward of a fair trial, but because her counsel failed to properly object the error was waived. Petitioner had no basis to object. He did the only thing he could and that was to move for a severance based upon the prejudicial admission of this evidence.

Even the Sixth Circuit recognized the prejudice:

> "The district court should have instructed the jury that it could use the prior conviction only for its worth as proof that Ward had a intent to commit the crimes charged. *Rule 404(b) evidence, even when properly admitted, under a properly (sic) limiting instructions, asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness. Such evidence has great potential for unfair prejudice,* and ordinarily it is only the trial court's carefully and clearly articulated limiting instructions as to the specific purpose for which the evidence may

> be considered by the jurors, that avoids substantial unfairness to the accused. Here, the court's instruction was certainly error . . . " (emphasis supplied) (App. 12-13)

The Sixth Circuit speaks of mental gymnastics required by jurors to understand the relevance of uncharged conduct as concerns Ms. Ward, but it is quite comfortable in its belief that the jury full-well understood that it could only consider the evidence as concerns Ms. Ward, after having been bombarded for numerous days with the government's theory that Petitioner and Ms. Ward were interchangeable. Furthermore, the bald assertion that Petitioner's guilt was overwhelming conveniently overlooks the fact that all of the incriminating nuances to the government's evidence concerning Petitioner had to be interpreted by Norvell Terry who was thoroughly discredited as a witness. Who is to say that the jury discounted Terry, (and the Michael Smith acquittal supports that conclusion) and focused on another judge's pronouncement that Ms. Ward was "a big time drug dealer." Having concluded that fact through uncharged conduct that the Sixth Circuit admits should have never gone to the jury in the form that it did, it is a short leap to conclude that Earl Morris is also a "big time drug dealer." Petitioner should have either been granted a severance or the challenged evidence should have never gone to the jury. *Zafiro v. United States, supra.*

**B. The Sixth Circuit Opinion Which Recognizes That Material Government Witnesses Committed Perjury, And One Openly Suborned Perjury Of Other Government Witnesses Did Not Violate Petitioner's Right To A Fair Trial And Due Process Is Clearly Error Of The Gravest Magnitude.**

During the course of the trial an ex parte hearing was necessitated because of the conduct of Norvell Terry who was the government's centerpiece witness. The trial court granted the ex parte relief recalling Terry to the stand for further cross-examination and as a result of that ruling it was established that Norvell Terry had attempted to coerce Marcus "Bobby" Holder into giving false testimony. (App. 29-76) It was further developed that Norvell Terry was displaying his 302 statements to other witnesses so they could conform their testimony to that which he had given. (Id.) The government was aware of Norvell Terry's conduct as established by the testimony of SA Wally Drueck. (App. 40-47) Likewise, the government is to be held accountable for the acts of its agents. See *United States v. Phibbs*, 999 F.2d 1053, 1066 (6th Cir. 1993) citing *United States v. Tarradino*, 846 F.2d 1384, 1413 (D.C. Cir. 1988). Petitioner moved for a mistrial because Norvell Terry was denying him his right to a fair trial and due process under the Fifth Amendment to the United States Constitution. (App. 50) The Motion was overruled and denied by the trial court.

The above scenario came on the heels of Norvell Terry's first testimony where he gave extensive testimony about motel records, telephone records and other documents that allegedly implicated the Petitioner to drug

deals in the Nashville area. (App. 78-93) It was admitted by Special Agent Dan Hodges of the FBI, that Norvell Terry's testimony about these otherwise innocuous records is that which turned them into proof of criminality. (App. 95-98) During the course of his testimony, Norvell Terry lied about attempting to intimidate a witness, obstructing justice and suborning perjury on a prior occasion. (App. 106-113) The trial court made a specific finding that Norvell Terry lied about this prior conduct. (App. 113) Likewise Norvell Terry gave perjured testimony when he alleged that he had told Special Agent Rankin in a statement, pre-trial about "Uncle Eddie." Agent Rankin unequivocally denied that Norvell Terry had told him anything about that which Terry later testified to at trial. Norvell Terry further lied about the reasons he posted bond for two defendants that he had met at the Metropolitan Nashville jail.

In addition to Norvell Terry's litany of perjury, Marcus "Bobby" Holder admitted that he too had committed perjury when he testified at trial that the Petitioner had threatened to kill Norvell Terry and that he had given the Petitioner one hundred thousand dollars ($100,000.00) that was proceeds of a drug transaction. (App. 59-71) All of this proof was virtually undisputed by the government and adopted by the Sixth Circuit where it opined:

> "The government argues that, while there is some evidence that Terry perjured himself regarding collateral issues, his perjury was brought to the attention of the jury by the Defendants, themselves when all three Defendants were given virtually unlimited latitude to

> cross-examine Terry and other witnesses regarding the collateral matters about which Terry lied." (App. 15-16)

The Sixth Circuit goes on to distinguish *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), on the grounds that Terry's perjury was brought to the judge's attention. As the panel goes on to note:

> "We know of no rule that stands for the proposition that, even with full cross-examination the introduction of perjured testimony *per se* warrants a new trial." (App. 16)

Other than completely disregarding Holder's admitted perjury, that was material in nature and was so inflammatory as to influence the outcome, the Sixth Circuit completely ignores precedent of this Court. For the Sixth Circuit to blindly accept the use of perjured testimony and the attempt by a government witness to coerce and intimidate other witnesses to commit perjury in order to garner the benefit of a 5K1.1 U.S.S.G. reduction in sentence goes beyond the pale.

As this Court noted in 1935, in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor –

> indeed, he shall do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Furthermore, as this Court clearly established in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the use of false testimony by a government witness does not get cured because the jury gets to weigh the false testimony and decide the credibility of the witness. The use of false testimony known to the government as was the case, here leads to a reversal of the conviction. (*Id.*) Petitioner was denied his right to due process and a fair trial under the Fifth Amendment because of the conduct of the government's star witnesses Norvell Terry and Marcus "Bobby" Holder.

## CONCLUSION

For the foregoing reasons the Petitioner prays that a Writ of Certiorari issue to review the decision of the Sixth Circuit and vacate the decision below and order the case remanded for a new trial.

Respectfully submitted,

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*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION:
1999 FED App. 0321P (6th Cir.)
File Name: 99a0321p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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|---|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* | ) | |
| *v.* | ) | Nos. 97-6089/ 6199/6200 |
| CHERYL WARD, a/k/a Cheryl Morris (97-6089), EARL MORRIS (97-6199), and LARRY TURNLEY, a/k/a "L.T." (97-6200), *Defendants-Appellants.* | ) | |

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 96-00120 – Thomas A. Wiseman, Jr.,
District Judge.

Argued: December 15, 1998

Decided and Filed: September 7, 1999

Before: RYAN, SUHRHEINRICH,
and COLE, Circuit Judges.

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**COUNSEL**

**ARGUED:** Martin S. Pinales, SIRKIN, PINALES, MEZIBOV & SCHWARTZ, Cincinnati, Ohio, Charles R.

Ray, Nashville, Tennessee, Sabin R. Thompson, WILLIAMS & PROCHASKA, Nashville, Tennessee, for Appellants. Vicki S. Marani, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION, CRIMINAL DIVISION, Washington, D.C., for Appellee. **ON BRIEF:** Martin S. Pinales, John P. Feldmeir, SIRKIN, PINALES, MEZIBOV & SCHWARTZ, Cincinnati, Ohio, Charles R. Ray, Nashville, Tennessee, Sabin R. Thompson, WILLIAMS & PROCHASKA, Nashville, Tennessee, for Appellants. Vicki S. Marani, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION, CRIMINAL DIVISION, Washington, D.C., for Appellee.

RYAN, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. COLE, J. (pp. 17-21), delivered a separate opinion concurring in part and dissenting in part.

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**OPINION**

---

RYAN, Circuit Judge. The three defendants in this case, Earl Morris, Cheryl Ward, and Larry Turnley, were convicted of participation in a large cocaine distribution conspiracy. Their appeals raise the following issues:

- Whether there was sufficient evidence to support Ward's conviction for possession of cocaine and Turnley's conviction on the conspiracy count;

- Whether the district court erred by admitting in evidence, a certified copy of a judgment of Ward's previous conviction for a drug offense, which contained extraneous material;

- Whether the district court abused its discretion in refusing to grant Morris a separate trial;
- Whether there was a violation of 18 U.S.C. § 201(c)(2);
- Whether the district court abused its discretion in denying Morris and Turnley a mistrial or new trial because of alleged perjury, subornation of perjury, and denial of due process; and
- Whether the court erred when it included in the sentencing calculus, conduct for which Turnley was acquitted, thereby resulting in a life sentence.

For the reasons discussed below, we will affirm in all respects.

## I.

A grand jury indicted the three defendants, as well as seven others, charging all with complicity in a very large cocaine trafficking conspiracy. All but the three defendants and Michael Smith pled guilty and agreed to cooperate with the government and testify at the defendants' trial in return for reduced sentences for some, and the promise of a sentence reduction recommendation pursuant to section 5K1.1 of the Sentencing Guidelines for others. Michael Smith was acquitted on all counts.

The indictment charged Morris and Ward with distribution and possession with the intent to distribute cocaine on April 10, 1995, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, the aiding and abetting

provision. Six additional counts charged Morris and Ward with possession of cocaine, on dates ranging from July 27, 1994, through March 14, 1995. All of the codefendants, including the three appealing here, were charged with conspiring to distribute and possess cocaine from June 1, 1994, through April 10, 1995, in violation of 21 U.S.C. § 846. Morris was charged with engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 848. Morris and Ward were also charged with money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (2). In addition to the conspiracy counts, Turnley was charged with distribution and possession with intent to distribute cocaine base on April 24, 1996, and possession with intent to distribute cocaine base on June 12, 1996.

During trial, many of the defendants' co-indictees testified, and the following details of the conspiracy were revealed. Morris was the head man in the conspiracy; his supply of cocaine started the distribution ring. His girlfriend, Ward, was said to be second-in-command. Some witnesses testified that Ward was in charge when Morris was not around; others, however, testified that she was merely present during the drug transactions, and had only a minor role. Morris and Ward, who lived in Los Angeles, California, transported cocaine to Norvell Terry in Nashville, Tennessee, and to Terry's cousin, Marcus Holder, in Indianapolis, Indiana. The quantity sold to Terry was very large, usually around 30-40 kilograms per delivery, while Holder would receive much smaller quantities, approximately 5 to 10 kilograms.

Terry would distribute 30-40 kilograms in a matter of hours, by selling fairly large quantities to many of the

codefendants, including Turnley. He would collect the money, usually $22,000-$26,000 per kilogram, keep his share, and deliver the rest of the money to Morris and Ward. Terry testified regarding all of the transactions during the conspiracy time frame, and his testimony was corroborated by telephone records, and records from hotels in Nashville, where the cocaine changed hands.

The conspiracy ended in April 1995, when authorities were tipped off that Terry and Melissa Spangler, who helped Terry count money, were engaged in large drug transactions in Nashville. The transaction began at Terry's house in Nashville on April 9, 1995. Morris and Ward arrived at Terry's house and placed two large duffel bags containing 38 kilograms of cocaine in a shed on Terry's property. The bags were later transported from the shed to one Quintinia Lewis's vehicle, and then to Spangler's rented car. On the morning of April 10, 1995, Terry and Spangler moved from the Super 8 Motel to the LaQuinta Inn, and there, the police began surveillance. Later that day, Terry and Spangler met at a park, and Terry realized they were being followed. Spangler returned to the motel and was subsequently arrested. The police searched her car and discovered the 38 kilograms of cocaine.

Spangler agreed to cooperate with the police. She placed a recorded phone call to Terry, who eventually turned himself in to police. Terry then agreed to place a recorded phone call to Morris, telling him that Spangler had been arrested. Morris said he would get his people on the case to further develop the situation, thereby acknowledging his involvement with Terry and Spangler. Terry made a deal with the authorities and revealed the

entire conspiracy, including the details of the conspirators' money laundering. Eventually, all the conspirators were arrested, and all but the three defendants here and Smith pled guilty and agreed to cooperate.

After a lengthy trial, the convictions were as follows: Ward was convicted of six of the seven possession counts, the conspiracy count, and money laundering. She was sentenced to 262 months in prison. Morris was found guilty of six of the seven possession counts, the conspiracy count, and the money laundering charges, but was acquitted of the continuing criminal enterprise charge. He was sentenced to 360 months in prison. Turnley was convicted of the conspiracy count and the possession charge that resulted from a search of his home on June 12, 1996, but was acquitted of the distribution that allegedly occurred on April 24, 1996. Based on his extensive criminal history, including as relevant conduct, the April 24 transaction, of which Turnley was acquitted, he was sentenced to life in prison. All three defendants challenge their conviction, and Turnley appeals his sentence as well.

## II.

Ward and Turnley challenge the sufficiency of the evidence as to some, but not all, of the crimes of which they were convicted. In reviewing the district court's denial of Ward's and Turnley's motions for acquittal, we must determine, while reviewing the facts in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. *See United States v. Odom*, 13 F.3d 949, 958-59 (6th Cir. 1994).

A.

Ward challenges the six counts that allege possession of cocaine prior to the April 10, 1995, transaction, which ended the conspiracy. To prove that a defendant violated 21 U.S.C. § 841(a)(1), the government must establish "that a person knowingly and intentionally distributes or possesses with intent to distribute a controlled substance." *United States v. Forrest*, 17 F.3d 916, 919 (6th Cir. 1994). To prove that Ward aided and abetted the drug transactions under 18 U.S.C. § 2, the government must establish that Ward participated in the venture as something she wished to bring about and sought to make succeed. *See Odom*, 13 F.3d at 959-60.

Ward argues that there were very few references to her in any of the testimony during the trial, and that many of the witnesses, such as Spangler, testified only to meeting Ward or that Ward assisted her with the transportation of the cocaine. However, Holder testified that he delivered drug money to Ward, received cocaine from her, and considered her to be second-in-command. Terry testified that Ward was present during most of the transactions, and that she would count the money when it was delivered. He also testified that Ward would sometimes deliver drugs, although his testimony in that regard lacked specificity. The thrust of Ward's argument is that the government has not shown that she did anything more than associate with Morris; and she claims that her

presence at the drug transactions can be explained by the fact that she was Morris's girlfriend.

The government points out that to prove that Ward aided and abetted in the possession and distribution of cocaine, it need only show that Ward participated in the drug transactions in such a manner that would indicate that she had an active role in assuring that the enterprise succeeded.

While it appears that Ward's role in the venture was relatively minor, especially as compared to some of the other participants, there was testimony that she delivered drugs, counted drug proceeds, and drove the car that other participants used to deliver drugs or drug proceeds. These activities are more than sufficient evidence to support Ward's conviction as an aider and abetter. Accordingly, we affirm Ward's conviction.

B.

Turnley challenges the sufficiency of the evidence for his conviction on the conspiracy count only. The essential elements of the conspiracy charged against Turnley are: "(1) an agreement by two or more persons to violate the drug laws, and (2) each conspirator 'knew of, intended to join and participated in the conspiracy.' " *United States v. Elder*, 90 F.3d 1110, 1120 (6th Cir. 1996) (citation omitted).

"Proof of knowledge is satisfied by proof that the defendant knew the essential object of the conspiracy. . . . Every member of a conspiracy need not be an active participant in every phase of the conspiracy, so long as he is a party to the general conspiratorial agreement." *United*

*States v. Hernandez*, 31 F.3d 354, 358 (6th Cir. 1994) (internal quotation marks and citation omitted). The connection of the defendant to the conspiracy need only be slight if there is sufficient evidence to establish the connection beyond a reasonable doubt. *See id.*

Turnley argues that the only evidence against him was a "passing reference" by Terry that Turnley was one of the distributors. Turnley concedes that witness Ida Thompson testified that she knew Turnley to be one of Lewis's customers, but when Lewis testified, he never mentioned Turnley's name as one of his or Terry's customers. And while the government points to records of phone bills showing calls made between Terry and Turnley, Turnley rebuts this evidence by pointing out that there was evidence on the record that Terry sold a car to Turnley, and that Turnley could not have been involved in any drug transactions after February 1995, because he had been in jail.

While the evidence of Turnley's participation in the charged conspiracy is meager, we cannot say, particularly given Terry's and Thompson's testimony, that no rational trier of fact could have found Turnley guilty beyond a reasonable doubt. Terry's testimony, that Turnley was one of his distributors, might conceivably have been rejected by the jury on the ground that Terry was a convicted drug dealer who struck a deal with the government; but that is a credibility call for the fact finder and we are unable to say that no rational juror could convict on such evidence. *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Accordingly, we affirm Turnley's conviction on the conspiracy count.

## III.

We now turn to the question whether the district court erred in admitting a certified copy of a judgment and commitment order from Ward's previous drug conviction that contained extraneous material. The government sought to introduce evidence that Ward was previously convicted and sentenced in a federal court for possession with intent to distribute approximately 11 kilograms of cocaine on the authority of Federal Rule of Evidence 404(b) as proof that Ward had the requisite criminal intent to possess cocaine in this case. Ward objected, but the court allowed the prior drug conviction into evidence under Rule 404(b), instructing the jury that they were not to consider the prior conviction as evidence that Ward committed the crimes charged here, but only as evidence tending to prove that Ward had the requisite intent for the crime of cocaine possession. The court went on to instruct the jury that they could *also* use the prior conviction as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity and so forth and the absence of mistake or accident"; these, of course, being all of the factors listed in Rule 404(b). Plainly, none of the named factors, save "intent" and possibly "knowledge," was in issue in the case and they were not justification for admitting the prior conviction evidence.

The document admitted to prove the prior conviction and sentence contained a statement by the sentencing judge that Ward was a "big-time drug dealer." At the time of the admission of the document, Ward did not object to this extraneous statement, and did not ask that it be redacted. Therefore, there is nothing in the record to suggest that the court did or did not perform an analysis

under Fed.R.Evid. 403 to determine whether the probative value of the prior conviction was substantially outweighed by the prejudicial nature of that sentencing court's statement. However, during jury instruction discussions, Ward's attorney brought the "big-time drug dealer" comment to the court's attention, and objected to the admission of the document. The document had already been shown to the jury; therefore, the court suggested to Ward's counsel that he come up with a jury instruction to deal with the prejudicial comment. Not surprisingly, Ward's counsel declined to offer any suggestion, preferring not to further draw the matter to the jurors' attention.

Despite the district court's erroneous advice to the jurors as to the litany of purposes under Federal Rule of Evidence 404(b) for which they could consider the prior conviction, Ward does not argue that the commitment order should have been excluded. She argues instead that it was highly prejudicial to admit the order without excising the "big-time drug dealer" statement. But a party opposing the admission of a document on the ground that it contains prejudicial matter, "has the burden of requesting redaction and forfeits the right to exclude the statements if [s]he fails to make the specific request." *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 731 (6th Cir. 1994). Because Ward did not properly object to the unredacted judgment order, our review is limited to an assessment for plain error. *See United States v. Cowart*, 90 F.3d 154, 157 (6th Cir. 1996). We have held that we may exercise our discretion to reverse for plain error only when the failure to do so would result in a manifest miscarriage of justice. *See Finch v. Monumental Life Ins.*

Co., 820 F.2d 1426, 1432 (6th Cir. 1987). We do not believe the district court's apparent failure to notice the four-word comment in the five-page document can properly be characterized as error so serious as to result in a miscarriage of justice, particularly given that the defense counsel failed to bring the matter to the court's attention.

We point out, however, that while the commitment order was properly admissible under Federal Rule of Evidence 404(b) as evidence tending to show that Ward had the requisite intent to commit the crimes charged, we believe the jury instruction was erroneous. The district court simply listed all of the factors named in the rule for which evidence of uncharged misconduct *might* be admissible in *any* case, even though most of them were not applicable to this case. For instance, Ward's defense was not that she mistakenly thought she was selling powdered sugar instead of cocaine, thereby justifying Rule 404(b) evidence to prove "absence of mistake or accident," and no issue was raised in the case suggesting that "identity" was at issue. Similarly, the jurors could not possibly have understood how the prior conviction would have been relevant to prove "motive" or "opportunity" or "preparation" or "plan" or "and so forth," as instructed by the court. The district court should have instructed the jury that it could use the prior conviction only for its worth as proof that Ward had the intent to commit the crimes charged. Rule 404(b) evidence, even when properly admitted, under a properly limiting instruction, asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness. Such evidence has great potential for unfair prejudice, and ordinarily it is only the trial court's carefully

and clearly articulated limiting instruction as to the specific purpose for which the evidence may be considered by the jurors, that avoids substantial unfairness to the accused. Here, the court's instruction was certainly error, but since there was no objection to this part of the instruction, the prior conviction was admissible for at least *one* of the purposes recited by the district court, and we decline to exercise our discretion to find "plain error." We do, however, caution district courts, when admitting Rule 404(b) evidence, to instruct the jury that the "other act" evidence may be considered *only* with respect to the specific factor named in the rule – usually only one – which is in issue in the case. If the district court is uncertain as to the specific purpose for which such evidence may be admissible, the court ought to inquire of the prosecutor as to the purpose for which it is being offered, and then make a determination whether, in the court's judgment, the named purpose is in issue in the case. Because the error was waived by reason of the defendant's failure to properly object, and on the whole may be deemed harmless, we affirm Ward's conviction.

## IV.

The next issue we must address is whether the district court abused its discretion in denying Morris's request for a separate trial. *See United States v. Hofstatter*, 8 F.3d 316, 323 (6th Cir. 1993). Morris requested severance from the rest of the defendants several times. After the court ruled that it would admit Ward's prior conviction, Morris renewed his motion for a severance, claiming that Ward's prior conviction and designation as a "big-time drug dealer" would unfairly prejudice Morris because the

two were associated. The court denied Morris's request, but instructed the jury that it was to consider the evidence as to each defendant separately and decide their guilt or innocence separately.

The general rule is that "in conspiracy cases, persons jointly indicted should be tried together – and the defendant has the burden of proving substantial prejudice from a refusal to grant a separate trial." *Id.*

Morris has not carried that burden here. First of all, the court's instructions were very clear that the jury should judge each defendant's case separately. And second, the evidence against Morris was overwhelming. It is highly implausible that Morris would be deemed guilty by association based on Ward's guilt, considering the strength of the evidence that Morris was the ring leader of the conspiracy and Ward was "second-in-command."

V.

We now turn to the issue that has become the argument *du jour* in federal courts throughout the country: whether 18 U.S.C. § 201(c)(2) applies to situations in which federal prosecutors offer codefendants a reduced sentence or a sentence reduction recommendation pursuant to section 5K1.1 of the Sentencing Guidelines in exchange for cooperation with the government. Section 201(c)(2) provides that it is a crime for anyone to give, offer, or promise anything of value to any person, "for or because of the testimony . . . given or to be given by such person as a witness upon a trial." The three defendants in this case argue that this provision applies to the facts of

this case. We disagree. We note, however, that our resolution of this issue is simplified by an opinion of another panel of this court in *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1348 (1999). In *Ware*, this court, in a thorough and well- reasoned opinion, held that section 201(c)(2) does not apply to prosecutors offering leniency in sentencing; and even if it did, the exclusionary rule would not apply to the testimony of the witnesses who were offered lighter sentences in exchange for their testimony. *See id.* at 419-21. We will, as we must, follow the ruling of the *Ware* panel, and hold that 18 U.S.C. § 201(c)(2) does not apply to federal prosecuting attorneys.

## VI.

We next address the district court's refusal to grant Morris and Turnley mistrials or, in the alternative, new trials, on the basis of their claim that Terry committed perjury and subornation of perjury. They also allege that the combination of these alleged errors, as well as the district court's denial of Morris's motion for severance and the admission of Ward's prior conviction, so infected the trial that their due process rights were violated.

The denial of motions for a mistrial or for a new trial are reviewed for an abuse of discretion. *See United States v. Moore*, 917 F.2d 215, 220 (6th Cir. 1990), and *United States v. Garner*, 529 F.2d 962, 969 (6th Cir. 1976).

The government argues that, while there is some evidence that Terry perjured himself regarding collateral issues, his perjury was brought to the attention of the jury by the defendants themselves when all three defendants

were given virtually unlimited latitude to cross-examine Terry and other witnesses regarding the collateral matters about which Terry lied.

The defendants rely on *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), in which the court held that the issue of whether perjured testimony requires a new trial depends on the materiality of the perjury and the extent to which the prosecution was aware of the perjured testimony. *See id.* at 456. We think *Wallach* does not apply here, because in that case the perjured testimony was not brought to the attention of the jury, whereas here, the court gave the defendants several opportunities to cross-examine and recross-examine the witnesses to bring any inconsistencies in testimony to the attention of the jury. We know of no rule that stands for the proposition that, even with full cross-examination, the introduction of perjured testimony *per se* warrants a new trial.

Regarding the defendants' claim of denial of due process, this court has stated that errors that might not be prejudicial when viewed alone, may together produce a fundamentally unfair trial. *See United States v. Ashworth*, 836 F.2d 260, 267 (6th Cir. 1988). However, we have also cautioned that to give too much weight to the cumulative effect of errors would "violate the Supreme Court's warning in *Glasser v. United States*, 315 U.S. 60, 83 (1942): 'We must guard against the magnification on appeal of instances which were of little importance in their setting.' " *Ashworth*, 836 F.2d at 268 (parallel citations omitted). Because we have concluded that the district court did not err in its rulings and judgments, there is no cumulative effect from which to conclude that there has been a denial of due process.

## VII.

Finally, we turn to the one sentencing challenge: Turnley's claim that the district court erred when it included in the calculus of Turnley's sentence, conduct for which he had been acquitted, to wit, distribution and possession with intent to sell cocaine base on April 24, 1996. The facts of the charge are as follows: Turnley was in the car when one Thomasina Christian sold drugs to a confidential informant, but an earlier recorded phone call from the informant to Christian did not reveal Turnley's name. However, Christian testified that Turnley was the person who gave her the drugs and dictated the price. At sentencing, the court adopted the recommendation contained in the presentence report to include the marijuana equivalency of the crack cocaine as relevant conduct, in calculating Turnley's offense level. The result is that Turnley's sentencing range was increased from 324-405 months to 360 months to life in prison. Based on Turnley's extensive criminal history, the court sentenced him to life in prison.

Turnley did not submit objections to the presentence report. Accordingly, the court did not explicitly declare that it found by a preponderance of the evidence that Turnley supplied the cocaine base to Christian for her sale to the informant. Instead, the court adopted the factual findings and guideline applications in the presentence report. Turnley argues two things: (1) that the court was obligated to find that the acquitted conduct was proved by clear and convincing evidence instead of the preponderance standard; and (2) at the very least, the court was required to make a finding on the record that the conduct occurred by a preponderance of the evidence.

Because Turnley did not object to the presentence report, we review his argument that the court should have used the clear and convincing standard for plain error. *See United States v. Olano*, 507 U.S. 725, 732 (1993). Before a court can correct an error not raised below, it must determine that there was: (1) an error; (2) that is plain, i.e., well-settled in the law; (3) that affects substantial rights; and (4) that would result in a serious miscarriage of justice. *See United States v. Dedhia*, 134 F.3d 802, 808 (6th Cir.), *cert. denied*, 118 S. Ct. 1844 (1998). Despite some difference of opinion among the circuits as to which standard to use, *see United States v. Watts*, 519 U.S. 148, 156-57 (1997), this court has never adopted the clear and convincing standard, *see United States v. August*, 984 F.2d 705, 714 (6th Cir. 1992). Accordingly, we hold that the court did not err, much less plainly err, when using the preponderance of the evidence standard.

We review the district court's factual finding that the relevant conduct occurred by a preponderance of the evidence for clear error. See *United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994). Despite the fact that Turnley was acquitted of the drug transaction, we cannot say that the court clearly erred in relying upon Christian's testimony to conclude, by a preponderance of the evidence, that the conduct for which Turnley was acquitted, indeed occurred.

Regarding Turnley's contention that the district court did not make a finding on the record that the conduct occurred, this court held in *United States v. Wilson*, 920 F.2d 1290, 1295 (6th Cir. 1990), that because the district court adopted the presentence report as its findings of fact and law, the presentence report must be examined to

determine whether sufficient findings were made on the record to support the sentence. But, this court has also stated that a failure to object to the presentence report waives any future objections. *See United States v. Duranseau*, 19 F.3d 1117, 1123 (6th Cir. 1994). Because Turnley did not object to the presentence report that included a discussion of the relevant conduct, the district court was not on notice that it had to make more specific findings on the record. We do not believe that the district court erred when it included the acquitted conduct because it found by a preponderance of the evidence that the conduct occurred. Accordingly, we affirm the sentence.

## VIII.

For the above reasons, we **AFFIRM** the convictions of all three defendants and Turnley's sentence.

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## CONCURRING IN PART, DISSENTING IN PART

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R. GUY, COLE JR., Circuit Judge, concurring in part and dissenting in part.

I concur with the majority opinion, except section III, which addresses Ward's Fed.R.Evid. 404(b) claim. Because I believe that the admission of Ward's prior judgment and commitment order was unfairly prejudicial, I respectfully dissent with regard to that issue.

As an initial matter, I do not believe that the majority opinion fully captures the unfairness to which Ward was

subjected in this case. Indeed, reading the majority opinion, one might conclude that the only inflammatory material contained in Ward's prior judgment and commitment order was the court's "big-time drug dealer" comment. Certainly, there is no question that it was highly and manifestly prejudicial to allow the government to alert the jury to the fact that the United States District Court for the Eastern District of Kentucky had labeled Ward a big-time drug dealer.[1] As Ward points out, however, even more inflammatory was the order's relevant-conduct section, which concluded that Ward was responsible for the very acts at issue in this case. Thus, the district court permitted the government to introduce a document that contained another federal district judge's conclusion that, for all intents and purposes, Ward was guilty as charged.[2] I need not elaborate on the effect this must have had on the jury.

Given the prejudicial nature of the comments contained in the judgment and commitment order, as well as the prejudicial nature of the order itself, I would be inclined to reverse even if I agreed with the majority's

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[1] The statement, which describes the reason why the court imposed a 240-month sentence on Ward for possessing cocaine with intent to distribute in 1994, reads as follows: "To promote respect for the law & provide just punishment, and act as a deterrent to future criminal activity. Deft. is a big-time drug dealer, but the sentence is just for the crime; A sentence of 240 mos. is sufficient and justified."

[2] In this case, Ward stood accused of possessing cocaine with intent to distribute and distribution of cocaine on or about April 10, 1995. In Ward's prior judgment and conviction order, the court counted as relevant conduct "11.90 Keys and 38 Keys in April 1995."

conclusion that Ward waived her objection to the admission of this evidence. I do not agree with that conclusion, however. The majority's opinion places much emphasis on Ward's failure to specifically ask for a redaction of the judgment and commitment order at trial. Indeed, the majority writes that "Ward does not argue that the commitment order should have been excluded." This is not my understanding of either Ward's argument below or her argument before this court. Before trial, as the majority notes, Ward objected under Fed.R.Evid. 404(b) to the introduction of any evidence of her prior crime. Furthermore, she again objected under Rule 404(b) to the introduction of her prior judgment and commitment order.[3] As Ward notes, the redaction of the judgment and commitment order was merely one option available to the district court under Rule 404(b), as was excluding the order all together. *Cf. United States v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996) (stating that a court's exclusion of a tape recording under 404(b) could have either allowed proof on matter in question by other means or by playing less offending portions of the tape).

The majority is correct that Ward did not identify the specific inflammatory portions of the judgment and commitment order before it was admitted. Nevertheless,

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[3] Ward's attorney stated simply that "[t]here is an objection, Your Honor." The court noted the objection, and it is clear from the record that the court understood the nature of the objection. Indeed, the court shortly thereafter granted "[a]ll defendants . . . a continuing objection to 404(b) evidence." *See* Fed.R.Evid. 103(a)(1) (requiring litigants to specifically state the grounds for objections "if the specific ground was not apparent from the context").

because Ward sought to invoke the court's discretion to exclude the judgment and commitment order in its entirety because it was more prejudicial than probative, her objections were sufficient to preserve the matter for review. *See* Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure*, § 5036, at 176 (1982) ("Counsel has done all that the Rule requires to preserve the point if he 'objects' on the ground of 'prejudice' under 403.").[4] There is no question that the district judge would have been more likely to exclude the evidence in question had Ward's attorney detailed the factors that the judge was to balance in this case, *see id.*, but I cannot conclude that this lack of detail constitutes a waiver.

In any event, it is clear that the district court failed to follow this court's instructions for the proper application of Rule 404(b).

> Upon objection by the defendant, the proponent of the evidence, usually the government, should be required to identify the specific purpose or purposes for which the government offers the evidence of "other crimes, wrongs, or acts." . . . After requiring the proponent to identify the specific purpose for which the evidence is offered, the district court must determine whether the identified purpose, whether to prove motive or intent or identity [or] some other purpose, is "material"; that is, whether it is "in issue" in the case. If the court finds it is, the court must then determine, before admitting

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[4] In this circuit, district courts are required to conduct Fed.R.Evid. 403 balancing in evaluating a Rule 404(b) objection. *See United States v. Myers*, 123 F.3d 350, 363-64 (6th Cir. 1996); *Merriweather*, 78 F.3d at 1076-77.

> the other acts evidence, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403. If the evidence satisfies Rule 403, then, after receiving the evidence, the district court must "clearly, simply, and correctly" instruct the jury as to the specific purpose for which they may consider the evidence.

*Merriweather*, 78 F.3d at 1076-77. As the majority notes, the district court erroneously instructed the jury – both when the order was introduced and again in the court's final jury instructions – that it might consider the judgment and commitment order for any one of a number of purposes, rather than instructing the jury that it could consider the order only on the question of intent. In other words, "the district court *plainly erred* by instructing the jury that the [evidence was] admissible to prove 'opportunity,' 'preparation,' 'plan,' 'knowledge,' or 'absence of mistake.' " *Id.* at 1077 (emphasis added). Furthermore, there is absolutely no indication in the record that, prior to giving this erroneous instruction, the court conducted any sort of balancing under Rule 403. "Given the potential for confusion, misuse, and unfair prejudice from other act evidence, it is preferable that the district court make an explicit finding regarding the Rule 403 balancing." *United States v. Myers*, 123 F.3d 350, 363 (6th Cir. 1997). Such balancing would have necessarily led to the conclusion that, although the government may have been entitled to introduce some evidence regarding the prior acts of the defendant, the judgment and commitment order was substantially more prejudicial than probative. A factor in balancing probative value and unfair prejudice is the availability of other means of proof. *See United*

*States v. Latouf*, 132 F.3d 320, 329 (6th Cir. 1997). The government, in fact, informed the court that it had witnesses who could testify as to Ward's prior possession of drugs, in the event that the court disallowed the judgment and commitment order.

Because I believe that the admission of the judgment and commitment order was error[5] under Fed.R.Evid. 403 and 404(b) and our case law, I dissent from the majority's opinion in this regard. I would reverse Ward's conviction and remand for a new trial.

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[5] Additionally, I would not conclude that the error was harmless. *See Merriweather*, 78 F.3d at 1079.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

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| UNITED STATES OF AMERICA, | ) | Case No. 3:96-00120 |
| vs. | ) | Volume VIII |
| EARL MORRIS, et al. | ) | |

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BEFORE THE HONORABLE
THOMAS A. WISEMAN, SENIOR JUDGE

TRANSCRIPT

OF

PROCEEDINGS

April 18, 1997

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* * *

[p. 34] whether or not she possessed the necessary intent, whether or not there is any mistake or accident or failure to properly identify Ms. Ward in the instant case.

It may be considered for proof of motive or opportunity, preparation, plan, knowledge. But just remember that because somebody did something once before is not proof that they did something that they are being charged with here today. But you can consider it for these other items which I have just listed for you, that is, motive, opportunity, intent, preparation, plan, knowledge, identity and so forth and the absence of mistake or accident.

All right, this exhibit – what's the number, 48 – 48 will be received and may be passed to the jury.

MR. RAY: Your Honor, defendant Morris would have an objection to that also, and I will state my reasons later.

THE COURT: All right. All defendants may have a continuing objection to 404(b) evidence.

Call your next. Oh, we're still waiting for Mr. Rankin.

MR. ANDERSON: No, he walked in while the Court was making that instruction.

THE COURT: Bring him around.

MR. ANDERSON: May the jury have a moment to possibly review that?

* * *

[p. 45] MR. RAY: Inconsistencies on Mr. Terry's testimony. What Mr. Rankin remembers about the interview.

THE COURT: All right. You may go beyond the scope of the direct examination just to facilitate the proof.

MR. RAY: I appreciate it. I know Mr. Rankin appreciates it.

THE WITNESS: Yes, sir, I do. Thank you.

THE COURT: All right, then. Yes, Mr. Pinales.

MR. PINALES: Yes, a clarification, Your Honor. My office has faxed me an order by Judge Burtlesman where he denied the defense motion to suppress the items contained in the luggage but granted it as to the purse. It is not a certified copy.

MR. MOON: We believe the evidence in the purse was suppressed. We are having the documents faxed to us. We don't think it ends there though. There is some more consideration to be made, Judge.

THE COURT: All right. Well, I will hear you further on that. When is – yes, sir, Mr. Ray.

MR. RAY: Your Honor, for the record since this conviction has come in against Miss Ward, given the government's theory in this case how closely we have been connected, we submit that it might as well be a conviction against my client as well, and based upon that

we would move for a severance, Your Honor, the prejudice that would visit

* * *

**97-6089**

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Case No. 3:96-00120 |
| vs. | ) | |
| EARL MORRIS, et al. | ) | |

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BEFORE THE HONORABLE
THOMAS A. WISEMAN, SENIOR JUDGE

TRANSCRIPT

OF

PROCEEDINGS

April 17, 1997

Volume ___

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* * *

[p. 4] The above-styled cause came on to be heard on April 17, 1997, before the Honorable Thomas A. Wiseman, Senior Judge, when the following proceedings were had, to-wit.

THE COURT: All right, we'll take up first the motion by defendant Michael Smith regarding exculpatory evidence.

MR. CAMP: May it please the Court, this motion relates to the testimony of Norvell Terry and Marcus Anthony Holder, and as I noted in the motion memorandum prior to Mr. Holder testifying I had inquired of the government whether – I had advised the government that I believed Mr. Holder had told the agents at some point that he did not know Michael Smith or have any dealings with him and asked that the prosecution check over the lunch recess to confirm that. That I would like whatever statement, memorandum, notes, whatever there was if there was such reflecting that.

THE COURT: You did not receive them?

MR. CAMP: No, sir. During Mr. Holder's testimony, however – well, let me back up. I have attached to the memorandum a copy of the June 14, 1995, 302 of Norvell Terry in which in two pages, one and two, he refers to two separate specific instances in which Bobby Holder is alleged to have dealt cocaine to Mr. Smith. First time 20 to 30 kilos; the second time I believe he loaded 40 kilos into the trunk of –

THE COURT: Do you have a 302 from Bobby Holder?

[p. 5] MR. CAMP: I have it, yes, sir. I have a 302 of Mr. Holder that was done of an interview. I don't know if it was in Indiana or Illinois. It was done prior to his coming down here in which he makes no reference to Mr. Smith or anyone referred to as Six Pack. In reviewing my trial notes yesterday, may it please the Court, I note that in Mr. Terry's testimony he stated that he had put the drugs into the trunk of my client's car. In considering this later and listening to the testimony of Mr. Holder, Mr. Holder not only never referred to my client, but he was never asked by the government about my client. And in looking back at the 302 and my notes, it seemed strange to me that Mr. Terry has indicated on two occasions Bobby Holder was directly involved with my client which would, if true, corroborate Mr. Terry's testimony, which as the Court is aware is key to the government's case here.

And yet he was not asked. Bobby Holder was not asked by the government and didn't volunteer. And in fact, I believe at this point he would have said that that was not true. The government never got back to me on

my request as to whether such information is available. And not knowing that, I didn't ask Mr. Holder. Had I been provided information that Mr. Holder had said definitively I don't know Michael Smith, I never dealt with him, I certainly would have inquired of both Mr. Terry and Mr. Holder.

[p. 6] And this is not general sort of impeachment, Judge. It goes directly to what Mr. Terry is claiming about my client and the fact that he appears to have changed his version of what happened in the one instance from Mr. Holder putting drugs in the trunk to now Mr. Terry having done it. So I would ask to be provided with whatever information the government has that indicates that Bobby Holder advised them that he had not dealt with my client.

THE COURT: Mr. Anderson.

MR. ANDERSON: Your Honor, Mr. Camp has been provided with 302 of Mr. Bobby Holder, and in that 302 Mr. Holder does not make reference to Six Pack or Michael Smith.

THE COURT: Is there another 302, Mr. Anderson?

MR. ANDERSON: No.

THE COURT: Was Mr. Holder interviewed by Mr. Hodges after you brought him down here?

MR. ANDERSON: During the day that Mr. Camp refers to, he did ask me to have the agents check with Mr. Holder to see what Mr. Holder would have about Six Pack, what he would say about Six Pack so I

did at his request. I sent the agents back there. Even delayed calling Mr. Holder.

They talked to him during the lunch recess. I came back to court early. Now, I was never asked for any rough notes or any other statements. I was asked Robert, very nicely, do you mind having the agents check and see what [p. 7] Holder is going to have to say about Six Pack when he testifies. So I said sure, Sumter, I will be happy to.

They did that during the recess. I came down to court early waiting for Mr. Camp. Mr. Camp wasn't here. The Court called in the witness, Mr. Holder, before Mr. Camp returned to court. I turned to look to Mr. Camp, and he wasn't there. The agents told me that Bobby Holder hadn't slept all night, deathly afraid. They weren't sure what he would say about Six Pack so I decided I am just going to stay away from it. I am not going to ask him anything about Six Pack so I am not even sure what he would say in my heart of hearts so I decided to stay away from him. He wasn't asked anything about Six Pack.

THE COURT: Does Mr. Hodges have any rough notes of his conversation with Mr. Holder?

AGENT HODGES: Your Honor, it was Mr. Drueck who went out during the lunch recess and did that.

THE COURT: Where is Mr. Drueck?

MR. HODGES: I guess he is upstairs.

THE COURT: Call him down here.

MR. CAMP: Judge, while we're waiting for Mr. Drueck, I would advise the Court that it is my belief that Mr. Holder was interviewed at CCA after he was brought to Nashville. I don't know whether Agent Hodges was involved with that, but I believe that he was interviewed by one or [p. 8] more agents since he has been brought back to Nashville and before coming to the courthouse.

THE COURT: What agents?

MR. ANDERSON: Mr. Donegan did meet with him at CCA.

THE COURT: I am sorry?

MR. ANDERSON: Mr. Donegan did meet with him at CCA.

THE COURT: Which Mr. Donegan?

MR. ANDERSON: Gene Donegan.

THE COURT: Well, let's get him over here too. Call him. Get him over here.

MR. MOON: May I be excused?

THE COURT: Yes, sir.

MR. RAY: Your Honor, may I be excused to step down the hall?

THE COURT: Yes, sir.

MR. RAY: Thank you.

MR. MOON: They are all coming, Your Honor.

THE COURT: Thank you, sir.

MR. MOON: They are on their way down.

THE COURT: All right, when Mr. Donegan comes, let him remain outside the courtroom, Mister Marshal. Well, you are here first. When Mr. Drueck comes, let him remain outside of the courtroom. Swear the witness.

[p. 9] GENE DONEGAN was called, and being first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT.

Q. Mr. Donegan, did you interview Marcus Anthony Holder at CCA after he was brought down here from Indiana?

A. I did.

Q. Did you inquire of him –

THE COURT: Let him remain out.

Q. Did you inquire of him about any connections he might have with Michael Smith?

A. I did.

Q. Did you have the 302 of Mr. Terry at the time, and were you aware of what Mr. Terry had told Mr. Hodges and was reflected in the 302 of Mr. Hodges' interview with Mr. Terry?

A. I didn't have the 302, but I knew what was reflected. My questions weren't concerning the 302 at all.

Q. Were there any questions addressed to Mr. Holder regarding his delivery of cocaine to Michael Smith?

A. No, not with the delivery. Just asked if he had ever seen him.

Q. Have what did he say?

A. Something to the effect, I may have. He said, I am not sure. If I have, he was a dark-skinned guy.

But he wasn't anything of substance as to an exact yes, it was him or no, it wasn't him.

[p. 10] Q. Did you address any direct questions if Mr. Bobby Holder had ever transferred any cocaine to Mr. Michael Smith?

A. No, sir.

Q. You did not ask him that direct question?

A. No, sir.

Q. Why didn't you?

A. He couldn't I.D. him so at that time I didn't see it relevant. He couldn't I.D. him.

Q. Were you aware that Mr. Norvell Terry had told the agents that Bobby Holder had delivered some 30 to 40 kilos of cocaine to Michael Smith?

A. Yes.

Q. And you didn't ask him about that?

A. From the way I took that on the 302 that Bobby Holder was there at the motel not directly doing the delivery. That was just the way I had taken it.

THE COURT: Mr. Camp, you may inquire.

MR. CAMP: Thank you, sir.

EXAMINATION BY MR. CAMP:

Q. Mr. Donegan –

THE COURT: Did you make any rough notes of this interview?

THE WITNESS: No, sir, I did not.

THE COURT: Did you do a 302?

THE WITNESS: No, sir, I did not.

[p. 11] THE COURT: Go ahead.

MR. CAMP: Thank you, sir.

Q. Mr. Donegan, I believe you were present at the June 14, 1995, interview of Norvell Terry in the Montgomery County Jail, is that correct?

A. That's correct.

Q. And you were familiar with the 302 that Mr. Hodges prepared of that interview, are you not?

A. That's correct.

Q. All right. You are aware that in that interview, Mr. Terry claimed that he had in June of 1994 put Bobby Holder and Michael Smith in touch with each other. They met in a motel next door to the Taco Bell on Trinity Lane in Nashville. On the introduction of Michael Smith to Holder, Holder fronted Smith 20 to 30 kilos of cocaine to sell. You were aware of that?

A. That's correct.

Q. Is it your testimony that you did not ask Mr. Holder whether or not that had happened?

A. That's my testimony, yes.

Q. You are also aware that in that same interview, Mr. Terry advised that Bobby Holder had picked up 40 kilos of cocaine in two duffle bags, army green in color and carried it out to Michael Smith's gray four-door Ford approximately 1992 model and put it in the trunk?

[p. 12] A. As far as I recall, yes.

Q. Do you recall Mr. Terry telling you all of that on that occasion in June of '95?

A. I don't recall that exact wording. If it reflects that in the 302, I am sure he did.

Q. Would you like to see the 302?

A. No, I am just saying if he says that, I am sure he did.

Q. Is it your testimony today that you did not ask Mr. Holder whether or not that had occurred?

A. That's correct.

Q. Regardless of whether or not you asked Mr. Holder about Michael Smith, did you ask Mr. Holder whether he had dealt with anyone in two such occasions, be it Michael Smith or someone else in the Nashville area?

A. Only thing we – no. Only thing we asked Mr. Holder was his occasions to be down there and purchase cocaine from Mr. Morris.

Q. All right. Well, you didn't ask him about any occasions where he may have transferred cocaine to someone else?

A. Not to my knowledge, no.

THE COURT: Mr. Donegan, you say that you did ask him if he knew Michael Smith?

THE WITNESS: Yes. On the just before trial began, yes.

THE COURT: And he said he didn't know whether he [p. 13] knew him or not?

THE WITNESS: He says, I may know him. I may or may not know him. He said, Only thing I remember with him he is dark skinned.

THE COURT: Did you tell Mr. Anderson about this interview?

THE WITNESS: Yes.

THE COURT: And did you tell Mr. Anderson that you didn't think that Mr. Holder could identify Michael Smith?

THE WITNESS: Yes.

THE COURT: Why is that not exculpatory, Mr. Anderson? And why is that not Brady material?

MR. ANDERSON: Your Honor, it is in the 302s. Mr. Holder does not identify Mr. Michael Smith. He does not speak about Mr. Michael Smith. And that's –

THE COURT: I understand that, Mr. Anderson. But that is directly contrary to the testimony that you put on through Mr. Terry. Why is that not exculpatory?

MR. ANDERSON: Well, he – I don't follow the Court's drift here. I don't see what the Court's point is.

THE COURT: You don't?

MR. ANDERSON: No, sir.

THE COURT: You don't think it is important that your principal witness implicates Michael Smith in a drug transaction between Bobby Holder and Michael Smith and then [p. 14] Bobby Holder says I don't know Michael Smith, never saw him or can't identify him?

MR. ANDERSON: Mr. Terry testified he was here on direct, cross-examination. Mr. Michael Smith says I may know him, I may not know him. He wasn't asked, and in the 302 he doesn't mention that.

THE COURT: All right. Bring Mr. Drueck in.

(WITNESS EXCUSED.)

MR. ANDERSON: I might add, before trial Mr. Camp was told by myself that Mr. Holder was going to be here and was going to testify and Mr. Holder may have information about Mr. Smith even. I am really not sure. And it is my information that Mr. Camp was told that and that Mr. Camp interviewed Mr. Holder regarding that.

THE COURT: Swear the witness.

WALLACE DRUECK was called, and being first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q. Mr. Drueck, I believe it was day before yesterday were you asked by Mr. Anderson to go interview Mr. Bobby Holder?

A. That is correct, yes, sir.

Q. Did you make any notes of that interview?

A. Yes, sir, I did.

Q. Where are they?

A. Upstairs. I can go get them if you'd like.

[p. 15] Q. Yes, sir. Go get them.

MR. MOON: Your Honor.

THE COURT: Yes, sir.

MR. MOON: At appropriate time, may I speak?

THE COURT: Yes, sir.

MR. MOON: All right. I'd like to hear the rest of this first and then tell you what I see from the point of view of –

THE COURT: Everybody is going to get an opportunity to be heard on this, Mr. Moon. You are not going to be excluded.

MR. MOON: I appreciate that, Judge.

THE COURT: Yes.

MR. MOON: There are some loose ends which I am trying to tie together in my mind.

THE COURT: That's exactly what I am trying to do, Mr. Moon.

MR. MOON: Yes, sir.

(Witness returned to the stand.)

Q. Now then, Mr. Drueck, you have your notes?

A. Yes, sir.

Q. You may refer to your notes, and I want you to just tell us from start to finish about your interview with Mr. Holder.

A. Okay. If I could, Your Honor, preface it by I had also been sent out to CCA on the 14th to speak to Mr. Holder [p. 16] regarding an individual by the name of Eddie.

Q. Okay.

A. That it will make more sense the next day to you if I exlain that interview first.

Q. All right, go ahead and explain that one first.

A. I advised Mr. Holder that I had been sent out with the Court's permission to speak with him about an individual and I could only ask him certain questions about this individual. I asked him did he know anyone who Mr. Terry had referred to as Uncle Earl, and he said the only one that he knew was Earl Morris. I then asked him if he knew a black male, tall dark-complected, probably in his forties. At that point he said the person that I was probably talking about was an individual – he could not remember his name – that he had picked cocaine up from in Indianapolis at a motel. He struggled, tried to remember the name and couldn't think of the name. But he said that he hadn't met this individual on several occasions in Indianapolis. At that point I concluded that contact at CCA.

The next day, Your Honor, I was advised that Mr. Holder wanted to meet with an agent regarding some information. I contacted him on the 15th here in the witness room adjacent to your courtroom. Mr. Holder advised he didn't sleep at all last night. He was concerned about this name, at which point he said the individual's name was [p. 17] Eddie. He said that was the name of the person he had described to me the previous day. He said this is the individual that he had met at the motel in Indianapolis and stated that this person was involved or was with Earl Morris. Now, not at the motel but that he worked with Mr. Morris.

He said that the individual was younger than Mr. Morris, tall, dark complected, probably in his late forties, early fifties. He said he was quite scared about testifying. That he knew. he was going on the stand that day, and he was scared.

He then said that he was scared because he did have one issue that concerned him was regarding Mr. Smith. That he had not met Mr. Smith and that he was confused and that Mr. Terry had indicated to him that he had met Mr. Smith. And Mr. Holder wanted to clear that up that he had not. I told Mr. Holder that the only thing he could do was tell the truth. That's all we expected of him. That's all I wanted him to do was answer the questions completely and truthfully on the stand, and that was the end of the contact.

Q. And you are referring to your notes on this interview of the 15th, is that correct?

A. The 14th and 15th, yes, Your Honor.

Q. Did you give those notes to Mr. Anderson?

A. I did not provide notes, sir, but I provided the synopsis [p. 18] of the interview that took place.

Q. And when did you do that?

A. At the conclusion of the interview what I went back upstairs.

Q. And before Mr. Holder testified?

A. Yes, Your Honor.

Q. All right.

THE COURT: Now, does anyone have any questions of this witness?

EXAMINATION BY MR. RAY:

Q. Mr. Drueck?

A. Yes, sir.

Q. Do you have any knowledge that between the time of the 14th that you spoke with Mr. Holder about Eddie that he had any contact with Mr. Terry?

A. The only thing I can say about that, Mr. Ray, is that I had admonished him not to talk to anyone, any of the other witnesses about the case or any possible defendants about the case. That he should just go on what his knowledge was, what he knew to be the truth. But I had told him on the 14th that he shouldn't discuss this with anybody other than obviously when he came to court.

Q. But on the 15th, he obviously had refreshed his recollection from some source?

A. He recalled the name, yes, sir, Mr. Ray. I don't know [p. 19] how that came about. He just told me that he had not slept that night. I know he struggled with it on the 14th to try to remember the name. I didn't mention the name to him. I was very specific with the questions I asked him. Didn't even say well, did it begin with an E or anything like that.

Q. I believe that. But on the 15th he did advise you that Mr. Terry was putting pressure on him to give testimony about Michael Smith when he didn't know anything about Michael Smith, is that correct?

A. I don't know the term "pressure" came out, but he indicated that he had been told by Mr. Terry that he knew Mr. Smith, he being Mr. Holder, would know him and that he had dealt with him, and Mr. Holder said that he wanted to make sure it was clear that he had not.

Q. Thank you, Mr. Drueck.

A. Yes, sir.

THE COURT: Mr. Camp.

MR. CAMP: I have no questions of Mr. Drueck, sir.

THE COURT: Mr. Anderson.

MR. ANDERSON: Couple of questions, Your Honor.

EXAMINATION BY MR. ANDERSON:

Q. Mr. Drueck, when you spoke with Mr. Smith, do you remember whether or not I told you that you needed to go speak to him because of a request from Mr. Camp?

A. You mean Mr. Holder?

[p. 20] Q. Mr. Holder; I am sorry.

A. I was – yes, sir, I was told that there had been an issue that came up. And once you received permission from Judge Wiseman yes or no that you wanted me to take care if it was granted.

Q. And that in the rush of the court day you reported back to me the synopsis of what he had to say?

A. Yes, sir.

Q. And this was during a luncheon recess too, I believe?

A. Yes, sir, it was.

Q. And do you recall my leaving early to come back to court stating that I had to report that back to Mr. Camp?

A. Yes, I do.

Q. And did you advise me that the situation regarding Mr. Smith was just very confusing whether or not he knew him or didn't know him?

A. That he was stating that at this point he did not recall ever meeting Mr. Smith.

Q. And at other points he had said that he had?

A. That he had indicated to me. I had not discussed Smith with him previously, but at this point he told me that he did not recall meeting Mr. Smith and had indicated Mr. Terry had told him that he had.

Q. But you knew that at another point from talking with Mr. Donegan or something that he said that he might know Smith or [p. 21] did know Smith and could possibly testify about Smith?

A. I think that had come up in pre-trial in the information discussed that he would be – Mr. Holder would be one that could testify in regard to Mr. Smith, yes, sir.

THE COURT: Somebody told you that but Mr. Holder never told you that?

THE WITNESS: No, sir, he did not.

Q. And do you recall my saying well – or deciding that well, I don't know, we don't know right now whether he knows or doesn't know him and report that back to Mr. Camp and just going to go on?

A. Yes, sir, I do.

Q. Thank you.

(WITNESS EXCUSED.)

THE COURT: Mr. Anderson, what did you report to Mr. Camp?

MR. ANDERSON: I didn't report to Mr. Camp. We came back.

THE COURT: Before he cross-examined, did you tell him you knew this information before he cross-examined Mr. Holder?

MR. ANDERSON: No, I came down to court early. Mr. Camp wasn't here.

THE COURT: Understand.

MR. ANDERSON: Witness was brought in. I in fact I [p. 22] turned to look for Mr. Camp to walk over to talk to him. He wasn't sitting there. I said well, we're here. I am just going to say away from the whole issue and which I think –

THE COURT: All right, Mr. Moon, you said you wanted to be heard.

MR. MOON: That was before the last testimony by Mr. Drueck.

THE COURT: Do you still want to be heard, Mr. Moon?

MR. MOON: Well, I would ask the Court to keep in mind that as the Court knows from its days as a litigator that things in the middle of a trial are hectic and shifting.

THE COURT: Yes, sir.

MR. MOON: I believe that the government here and Mr. Anderson in particular has bent over backwards to try to make its witnesses available to the defense and not hide the ball. I don't mean to put Mr. Ray on the spot, but just yesterday we made Mr. Rankin available on a request and did so gladly. We did all of this with a good heart. It does appear that there was some information that Mr. Drueck had that was not communicated by Mr. Anderson to Mr. Camp. Mr. Anderson says he made an effort to come here and meet with Mr. Camp but at Mr. Camp's request. That meeting did not happen. Mr. Holder went on the stand, and Mr. Camp did not have that information available for cross-examination.

[p. 23] Whatever –

THE COURT: Mr. Moon, you are correct.

MR. MOON: Have I got the thread right on that so far?

THE COURT: Well, the trial of a case is hectic and you are right. I have been going around this track either as a trial lawyer or a trial judge for 43 years.

MR. MOON: Yes, sir. I know you have.

THE COURT: But that's not the question right now. The question is how do we remedy this situation.

MR. MOON: Right.

THE COURT: So what I am going to do is allow you, Mr. Camp, and you, Mr. Ray, to go interview these witnesses separately in the cell block: Mr. Terry, Mr. Wells and Mr. Bobby Holder. They are all here. You may interview them, and then if you still desire to do so, you may call all three of them back for further cross-examination.

MR. RAY: Your Honor, at this point my concern is that unlike our theory that was just a theory, we have now some concrete and substantive evidence that Mr. Terry is orchestrating these witnesses not at the direction of the government – I am not suggesting that – but he is for all intents and purposes at least in league with the government. And I would like the Court to make an inquiry as you did of Mr. Donegan and Mr. Drueck of Mr. Wells and Mr. Holder and [p. 24] even Ms. Spangler to the extent that Mr. Terry influenced and orchestrated their testimony in this courtroom.

THE COURT: Mr. Ray, I am going to allow you to call any of these witnesses back for further cross-examination that you desire to call back. And that's the end of my participation in this case.

MR. RAY: Well, to protect the record, Your Honor, I would move for a mistrial at this point on behalf of Mr. Morris based upon at least a reasonable belief that Mr. Terry has orchestrated the testimony of these government witnesses and has at least suborned perjury and perhaps maybe even achieved that goal.

MR. PINALES: I would join in that motion, Your Honor.

MR. CAMP: Judge, I don't have anything to say as to that.

THE COURT: Wait just a minute. I want to see who else moves for a mistrial. Mr. Johnson?

MR. JOHNSON: To be very frank, Judge, I have got to think about this. It is not one like one of these things the pitcher is called out to the mound and says hey, I have got to think about this for a minute.

THE COURT: You have got a minute.

MR. CAMP: Judge, before I would join in such a motion, I would like the opportunity to speak to the [p. 25] individuals that Your Honor is giving us an opportunity to talk to.

THE COURT: We'll take a recess.

MR. CAMP: Before you do that, Your Honor, could I make one statement for the record?

THE COURT: Yes.

MR. CAMP: Judge, I want to be clear about one thing here, Judge, and that is I did ask Mr. Anderson nicely and he did tell me nicely that he would do so. Mr. Anderson provided me a box load of discovery in this case which included exculpatory information that he may not have had to turn over until the middle of trial. I know that Mr. Anderson is lead counsel here and has been in the courtroom continuously and has had to rely on other people in this matter. I don't want the Court to have the impression that I –

THE COURT: I am not pointing any fingers, and I am not laying any blame, Mr. Camp –

MR. CAMP: Thank you, sir.

THE COURT: – at your feet or anybody or Mr. Anderson's or Mr. Moon's or anybody else. It is just a matter that we need to try to address and see what remedy can be made. Now then, Mister Marshal.

DEPUTY MARSHAL: Yes, Your Honor.

THE COURT: Can you make all three of these [p. 26] persons, Wells, Terry and Holder, available for interview separately and don't let them get back together after one of them has talked to you? Can you do that?

DEPUTY MARSHAL: I can, Your Honor. They are not here in the building. They will have to be brought over.

THE COURT: All right. Bring them over, and we'll be in recess until that time. Mr. Russ, if you please

tell the jury we're going to have to wait a little while before we start the case.

(A luncheon recess was taken.)

THE COURT: All right. I have given counsel about three and a half to four hours to conduct the interviews we discussed this morning. Are you prepared to go forward?

MR. CAMP: Yes, sir.

THE COURT: Mr. Ray?

MR. RAY: Yes, sir, Your Honor. And I submit that I am not trying to throw this off on Mr. Camp because he does an excellent job, but I think Mr. Camp probably has a dog in this fight more so than I do, and I would defer to Mr. Camp to proceed the way he sees fit.

THE COURT: Everybody will have that opportunity to proceed as he or she sees fit.

All right, do you wish to recall these witnesses for further cross-examination, Mr. Camp?

MR. CAMP: Yes, sir, I would. And I would first [p. 27] recall Norvell Terry.

THE COURT: All right. Mister Marshal, bring the jury in, and you may bring Norvell Terry in.

(The jury returned to the courtroom.)

THE COURT: Be seated, ladies and gentlemen. Ladies and gentlemen of the jury, let me explain to you that sometimes things happen in trials that cause delays and can't tell the jury everything that goes on, but simply

let me tell you that we have all been working. And despite the fact that you had to cool your heels, things have been proceeding.

So we're now going to have some witnesses recalled for further cross-examination. Bring Mr. Norvell Terry back around, please.

NORVELL TERRY was recalled, and having been previously sworn and remaining under oath, was examined and testified as follows:

THE COURT: All right. Mr. Terry, you are still under oath. Resume the witness chair, please. Mr. Camp, you may examine.

MR. CAMP: Thank you, sir.

CROSS-EXAMINATION

BY: MR. CAMP:

Q. Mr. Terry, I'd like to ask you some questions about your June '95 interview, and I will have the court bailiff pass you a copy of that document if you need to refer to that [p. 28] please.

Mr. Terry, I believe this interview took place on June 14 of 1995, is that correct, sir?

A. Yes, sir.

Q. And this is the interview at which Detective Gene Donegan of Metro vice office was present?

A. Yes, it was. Yes.

Q. And Special Agent Hodges was present?

A. Yes.

Q. Your attorney and Ms. Spangler's attorney were present?

A. Yes.

Q. And I believe there was a customs agent, Mr. Brown, was also present?

A. Yes, he was.

Q. All right. Now, and in that interview, Mr. Terry, did you describe to those agents an occasion in June of 1994 where your cousin Bobby Holder asked if you knew anyone who could purchase 20 to 30 kilos of cocaine?

A. Yes.

Q. And at that time you didn't know anybody who could move that kind of cocaine?

A. No. Not that much, right.

Q. All right. But you told them you would ask Quintin Lewis?

A. Michael Smith also, yes.

[p. 29] Q. All right. You told him you would ask Quintin Lewis if he knew of anybody. Is that what you told him?

A. And Michael Smith also, yes.

Q. So and did you tell them that you later put Mr. Holder and Mr. Smith in touch with each other?

A. Yes, I believe that's what I told them, yes.

Q. And that Mr. Holder then fronted Mr. Smith the 20 to 30 kilos of cocaine?

A. Yes. That's the way it came out, yes.

Q. And that Mr. Smith turned over to you 440,000 dollars in cash which you then turned over to Mr. Holder?

A. Yes.

Q. And Mr. Holder paid you 5,000 dollars for brokering the transaction?

A. I believe it was something like that, yes.

Q. And was that true?

A. Yes, it was. I still stick behind that statement, sir.

Q. All right. Did you tell the agents in that same interview that next cocaine deal in which you were involved occurred in August of 1994?

A. I believe so, yes.

Q. All right, sir. If you will look at page 2 of that statement at line 11.

A. Yes.

Q. And that this transaction also involved Bobby Holder and [p. 30] Michael Smith?

A. Yes.

Q. All right. And that on that occasion Mr. Holder took two green duffle bags with 40 kilos of cocaine and put those in the trunk of Mr. Smith's car?

A. Yes.

Q. And those were the 40 kilos that you referred to earlier having been stolen from Mr. Smith's apartment?

A. Yes, 8 out of that 40 got stolen, yes, and some money.

Q. And was that true?

A. Yes, it was.

Q. Now, Mr. Terry, did you ever show a copy of this statement to Marcus Holder?

A. No, I didn't. It was stole out of my room.

Q. Did you ever tell Mr. Holder that he needed to corroborate what I have just asked you about?

A. No, I didn't. Once it was stole out my room and he gave it to Chris Wells – because he can't read or write. He gave it to Chris Wells, and Chris Wells read it to him. I went on – I got on the telephone. I was talking on the phone. I knew something was going on so something told me to get off the phone and go check my room. I got up in my room. All this paperwork right here was gone.

So I proceeded downstairs going off verbally, cursing, and I called for the guards. They rushed in. Come [p. 31] to find out, Chris Wells was hid in the room with all of my paperwork writing things down and everything. Bobby Holder, all he could do is just throw his hands up. And that's what happened as far as him getting ahold of the paperwork.

Q. And when did that take place, sir?

A. Just took place I believe right before the trial started because I called – I called Mr. Gene Donegan, and my lawyer tried to get in contact with Special Agent Hodges and Mr. Anderson concerning that. So CCA where we are at they took the report about this, and they have just moved us in the same room. We was also in the same room together. That's how he got ahold of the paperwork. I was on the phone. So they made a report, and then they separated us.

Q. So you are saying you all were staying in the same room?

A. Me and him was in the same room. They had moved me together in the same room.

Q. And Mr. Terry, have you ever threatened Mr. Holder if he wouldn't testify according to this statement?

A. No, I haven't, sir.

Q. Did you ever tell Mr. Holder that you would have his mother and his wife indicted –

A. No.

Q. – for running drugs?

A. The way the whole thing – way this came down after he stole my paper work, his whole intentions when we got here [p. 32] was to help Mr. Morris out to get a mistrial, do whatever he could to help Mr. Morris get a retrial. I also translated, that to my attorney who was trying to get with Mr. Robert Anderson and everybody who was involved in this case. From day one I wrote notes before the trial even started I gave a note to Mr. Gene Donegan to give to Mr. Anderson. Me and Chris

Wells stating that no one was making us lie, no one was forcing us into lying and somebody needed to talk to Bobby Holder because he is planning on doing anything he can to get a mistrial where Mr. Morris wouldn't be upset with him or want to kill him.

And as far as the way it came out about his wife and them, Chris Wells showed him his plea agreement. Said look, Bobby, we got to tell the truth. Whenever we get done with it because you don't tell the truth, they can come back on you and take your plea agreement and thing get everybody who was involved in this in Indianapolis and whatever.

When Chris said this, I jumped in and said Bobby, that's right. I told about my auntie, told him about Angie and even Melissa had told him about all of this. So if you don't do the right thing, you going to get all of them locked up. He said well, okay, what I supposed to say? I said you go in there and tell the truth. I can't tell you, and Chris can't. He said, I am thinking about Earl. I said no, you need to talk about yourself. So from that he kept scheming. [p. 33] He's been scheming from day one before it even started.

Q. Mr. Terry, have you ever gotten any notes from Ms. Spangler at the time that you have been at CCA facility?

A. Yes, I have.

MR. CAMP: No further questions of this witness, Your Honor.

THE COURT: Anyone else on the defense side?

MR. RAY: No, Your Honor.

MR. PINALES: No, Your Honor.

MR. JOHNSON: No, Your Honor.

THE COURT: Mr. Anderson.

MR. ANDERSON: None, Your Honor.

(WITNESS EXCUSED.)

THE COURT: Who else do you want, Mr. Camp?

MR. CAMP: Mr. Holder, Your Honor.

THE COURT: All right, bring Mr. Holder in, please Mister Marshal.

BOBBY HOLDER was recalled, and having been previously sworn, was examined and testified as follows:

THE COURT: You are still under oath. Resume the witness stand, Mr. Holder.

CROSS-EXAMINATION

BY MR. CAMP:

Q. Mr. Holder, you are I believe cousin of Norvell Terry, is that correct?

[p. 34] A. Yes, sir.

Q. And you testified here earlier in the week about your involvement in this case?

A. Yes, sir.

Q. And it is my recollection, Mr. Holder, that you never mentioned Michael Smith or an individual known as Six Pack, is that right?

A. In court?

Q. In your testimony, yes, sir.

A. No, sir.

Q. And the reason for that, Mr. Holder, is that you don't know Michael Smith, is that right?

A. No, sir.

Q. You never had any dealings with Michael Smith or anybody called Six Pack?

A. I never seen the guy before in my life until I came here.

Q. All right. Mr. Holder, let me ask you specifically whether in June of 1994 you fronted to Michael Smith 20 to 30 kilos of cocaine?

A. Me?

Q. Yes sir.

A. No, sir.

Q. For which Norvell Terry turned over to you 440,000 dollars in cash?

[p. 35] A. Me?

Q. Yes, sir.

A. (Shakes head.) Didn't happen.

Q. Didn't happen?

A. No, sir.

Q. You would remember if it happened?

A. Yes, sir.

Q. I mean have you ever had 20 kilos of cocaine, Mr. Holder?

A. I ain't never had 20 keys in my life.

Q. Mr. Holder, let me ask you about an occasion August of 1994 that supposedly took place here in Nashville, Tennessee, in which you supposedly loaded two green duffle bags containing 40 kilos of cocaine into Michael Smith's trunk of his car. Did that happen?

A. No, sir.

Q. Now, Mr. Holder, has anybody suggested to you that in fact you do know Michael Smith?

A. What do you mean by that?

Q. You told us you don't know Michael Smith, is that right, sir?

A. Yes, sir.

Q. Has anybody told you that in fact you do know Michael Smith or tried to suggest to you that you know Michael Smith?

A. Mr. Terry.

[p. 36] Q. I am sorry?

A. Mr. Terry.

Q. That would be Norvell Terry?

A. Yes.

Q. Your cousin. Did Mr. Terry at some point show you a copy of a statement containing what I have just

described to you, the information about these two transactions?

A. Yes.

Q. All right, sir. Now, and did Mr. Terry try to get you to testify in this court that in fact you did know Michael Smith and that in fact you had put cocaine in his trunk of his car.

A. I wasn't going to do it anyway. I talked to Mr. Hodges and –

Q. All right, sir. But Mr. Terry tried to get you to say that, didn't he?

A. Yes.

Q. And obviously when you testified in this court under oath earlier this week you did not say that?

A. No, sir.

Q. But Mr. Terry approached you about trying to get you to say that?

A. Yes, sir.

Q. Now, and as a part of doing that, did he give you a copy of one of his statements to review?

[p. 37] A. He didn't give it to me. He read it to me, right, and told me – he went over it a couple of times. what it was, I talked to Mr. Wells about it and I told Mr. Wells it wasn't true. So what happened I went and got it while he was on the phone and showed it to Mr. Wells, and I copied it. And I told him I couldn't do this, man. I don't come to lie. I am going to tell the truth. You know.

Q. All right, now, Mr. Holder, how well do you read?

A. Not that well.

Q. Did you take the statement to Mr. Wells to have Mr. Wells read it to you?

A. Yes, sir.

Q. All right. And did Mr. Wells do that?

A. Yes, sir.

Q. Mr. Holder, did Mr. Terry threaten you if you would not go along with his plan to implicate Mr. Smith?

A. Yes.

Q. All right, sir. Now, Mr. Holder, you are not here today because you want to be, are you?

A. I ain't never want to come here from the beginning.

Q. You understand you were brought her [sic] pursuant to a court order?

A. Yes, sir.

Q. When you had an opportunity to speak with your attorney in this case, Mr. Kamen, is that right?

[p. 38] A. Yes.

Q. All right. And he advised you that whoever called you or for whatever reason you were to tell the truth, is that right, sir?

A. Yes, sir.

Q. Now, what was the threat that Mr. Terry made to you if you didn't testify the way he wanted you to?

A. Oh, god. Um, told me if I didn't tell the truth he was going to get my mother indicted and my wife and friend of mines indicted.

Q. Now, Mr. Holder, was he just explaining to you that information was already out there and that that could happen?

A. Yeah, because read it to me and he said that Mr. – the prosecutor like here didn't like me and he wasn't going to recommendation. I mean, I know the truth. He didn't like me and what they would do, they would work with Indianapolis if I didn't cooperate, get them indicted and me indicted too on some more charges. Mr. Wells was right there.

Q. Mr. Wells was there during that conversation?

A. Yes.

Q. Mr. Holder, do you know whether or not Mr. Terry has received any notes from Melissa Spangler while he's been at CCA?

A. Back and forth. They have been doing it since we have been there.

[p. 39] THE COURT: Speak louder.

A. They have been doing it since we have been there.

Q. You said back and forth the notes have been going?

A. Yes, sir.

Q. Do you know whether or not those notes had anything to do with what was happening in this trial?

A. Yes, sir.

MR. CAMP: If I could have just a moment, Your Honor.

THE COURT: Yes.

Q. Mr. Holder, before you testified in this court on Tuesday, you advised one of the government agents that you were not going to lie for Norvell Terry, is that right?

A. Told them I wasn't going to lie period for nobody.

Q. For anybody but certainly not for Mr. Terry?

A. For anybody. Mr. Terry or anybody.

Q. All right. And you were not asked any questions about Michael Smith as a result of that?

A. What do you mean?

Q. Well, you told them that that particularly had to do with your saying anything about Michael Smith. Wasn't that what you told me?

A. Yes.

Q. That that was what Norvell Terry was trying to get you to do was identify Michael Smith and you weren't going to do [p. 40] that?

A. Yes, sir.

Q. All right. Those are all of my questions.

THE COURT: Mr. Anderson.

MR. ANDERSON: Thank you, Your Honor. I have just a few questions.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q. Mr. Holder, you are currently serving a sentence, correct?

A. Yes, sir.

Q. And that sentence is how many years?

A. Thirteen and a half years.

Q. And you wanted to have your sentence further reduced, didn't you?

A. Yes, sir.

Q. And I told you that would never happen no way, correct?

A. Yes, sir.

Q. And in fact, you asked me that on several times?

A. Yes, sir.

Q. And every time I looked at you just as I am now right in the eye and said that's not going to happen, right?

A. Yes, sir.

Q. That doesn't please you, does it?

A. I mean I already knew I wasn't going to get no time [p. 41] knocked off when I first came here. My lawyer told me.

Q. And but you asked me to have more time reduced because you wanted to, didn't you?

A. Yes, sir, I asked for a recommendation.

Q. Now, you weren't asked any questions about Mr. Smith the other day because you never said you knew about Mr. Smith?

A. Yes, sir.

Q. In your original statement you don't even mention Mr. Smith, do you?

A. No, sir.

Q. But you mentioned all the other things that you told about, don't you?

A. I told the truth about everything, sir.

Q. Okay. Couple of other questions. Now, about the drug deals that you were involved in here, you didn't live in Nashville, right?

A. No, sir.

Q. You lived in Indianapolis of course?

A. Yes, sir.

Q. The people that you knew here in Nashville were Norvell Terry, correct?

A. Yes, sir.

Q. Melissa Spangler, though you never met Melissa Spangler here, did you?

A. Have I met her here?

[p. 42] Q. Did you ever meet Melissa Spangler here in Nashville?

A. I knew her from Indianapolis.

Q. And of course you know the defendant Earl Morris?

A. Yes.

Q. And you know the defendant Cheryl Ward?

A. Yes, sir.

Q. Now, Mr. Michael Smith you had never met at any time while you were growing up and living in the City of Indianapolis, right?

A. I never seen that guy. Michael, him, Six Pack? I ain't never seen him before.

Q. How do you know which one is him?

A. Because they have explained what he looked like, and he is dark skinned and can't miss him. How can you miss him?

Q. But you never knew him in Indianapolis, did you?

A. No, sir.

Q. And you never knew him in Nashville, did you?

A. No, sir.

Q. And drug deliveries are pretty quick and fast, aren't they?

A. Yes, sir.

Q. And who else was involved in putting dope in cars, taking dope out of cars or walking up to hotel rooms or walking down from hotel rooms to cars happens pretty quickly, doesn't it?

[p. 43] A. Yes, sir.

Q. So you may not know exactly who was involved and actually carrying dope from a hotel room to a car and back and forth, right?

A. No, sir.

MR. ANDERSON: That's all I have, Your Honor.

MR. RAY: Your Honor, may I briefly?

THE COURT: You may ask, Mr. Ray, further questions.

MR. RAY: Thank you.

CROSS-EXAMINATION

BY MR. RAY:

Q. Mr. Holder, was it your understanding when you were brought her [sic] to testify that you were going to testify right behind Norvell Terry?

A. That was my understanding.

Q. And something happened to cause two other witnesses to be interspersed between you and Mr. Terry's testimony, isn't that correct?

MR. ANDERSON: Objection, Your Honor. Could we approach?

THE COURT: Sustained.

A. What do you mean by that?

THE COURT: Sustained.

A. Oh.

[p. 44] THE COURT: We won't go into that any further.

MR. RAY: Could we approach?

THE COURT: That's the end of it, Mr. Ray.

MR. RAY: All right, sir.

MR. CAMP: Judge, could I ask a followup question?

THE COURT: Only as it relates to something that was asked by Mr. Anderson in his redirect.

MR. CAMP: Yes, sir, it does.

RECROSS-EXAMINATION

BY MR. CAMP:

Q. Mr. Molder [sic], Mr. Anderson said that sometimes drug deals are fast and furious and you may not know all of the parties. I understood you to say that you on no occasion ever had a face-to-face with this gentleman in which you handed him 20 or 30 kilos of cocaine in this city, is that right?

A. No, sir.

Q. And I understood you to say you never had 20 kilos in your life?

A. No, sir.

Q. So whether it was Michael Smith or somebody else in Nashville, you never were involved in a 20-to-30-kilo deal that you fronted to somebody else for 440,000 dollars here, were you?

A. No, sir.

[p. 45] Q. And if Norvell Terry had said that in this courtroom under oath, that would be a lie?

A. Yes, sir.

MR. ANDERSON: Objection, Your Honor. He won't know exactly what was in the mind or what Norvell Terry had observed or seen.

THE COURT: Overruled. You may answer the question.

MR. CAMP: Nothing further.

THE COURT: Thank you, sir. You may come down.

(WITNESS EXCUSED.)

MR. MOON: May we have just a moment? May we have a side bar?

THE COURT: Yes, sir.

(A bench conference was held as follows:)

MR. MOON: In light of that last examination, I wanted Mr. Anderson,to have a moment to look at this

testimony previously of Mr. Holder and see what he wanted to do with it when Mr. Holder said if he can have ten minutes.

THE COURT: He may have a few minutes to look at it if that's what you are asking for.

MR. MOON: Yes.

MR. RAY: May I make a proffer?

THE COURT: Yes, sir.

MR. RAY: Judge, I recognize that I asked the [p. 46] question badly and looked like it was outside of the scope of what Mr. Anderson asked, but he left the impression with this jury that Mr. Holder had not been forthcoming about this situation. And that's Mr. Holder's statement to both Mr. Camp and I that he summoned Agent Hodges to the lockup and was crying and advised him that he could not lie, wasn't going to lie and that he was the next witness up and –

THE COURT: Mr. Camp went into that to some extent, Mr. Ray, and you deferred to Mr. Camp on this, and I am not going to go into this any further.

MR. RAY: All right, sir.

THE COURT: Now your intention to leave by that question to leave the implication that the government has been involved in some hanky-panky, and I don't believe it and don't believe there is any grounds for pursuing it. And I am stopping the inquiry now. (Bench conference concluded.)

THE COURT: You may call your next.

MR. CAMP: I am sorry, sir, I thought they were –

THE COURT: I thought you wanted to call Mr. Wells?

MR. CAMP: Yes, sir. I didn't know if they were through.

THE COURT: Oh, excuse me. You are right.

MR. ANDERSON: Nothing further, Your Honor.

[p. 47] (WITNESS EXCUSED.)

THE COURT: Now then, you want Mr. Wells?

MR. CAMP: Yes, sir, please.

CHRIS WELLS was recalled, and having been previously sworn and remaining under oath, was examined and testified as follows:

THE COURT: Mr. Wells, resume the witness chair, please. You are still under oath.

DIRECT EXAMINATION

BY MR. CAMP:

Q. Mr. Wells, let me ask the court officer to pass you this document which appears to be a 302 of Mr. Norvell Terry dated June 14 of 1995 and ask you to just look at the highlighted portion there on the second page of that copy. Do you see that, sir?

A. Yes, sir.

Q. Mr. Wells, did Bobby Holder bring that document to you one day and ask you to read that to him?

A. Yes, sir.

Q. And you did read it to him?

A. Yes, sir.

Q. You read that part that I have highlighted there?

A. Yes, sir.

Q. And that part of the statement has to do with Mr. Terry claiming that Mr. Holder put two bags containing 40 kilos of [p. 48] cocaine in the trunk of Michael Smith's car, is that right?

A. Yes, sir.

Q. And after you read that to Mr. Holder, did Mr. Holder in your presence deny that that had ever happened?

A. Yes, sir.

Q. All right, sir. Did he tell you where he had gotten the statement or why he had it?

A. He said he took it out of Norvell's room.

Q. All right. Did he tell you why?

A. Did he tell me why he took the paper?

Q. Yes.

A. That he had wanted me to read it to him.

Q. All right. You knew Mr. Holder didn't read very well?

A. Yes.

Q. And after you had read it to him, did he tell you that this was what Mr. Terry was trying to get him to say in court?

A. Yes.

Q. And he said that wasn't true?

A. Yes.

Q. Now, was there an occasion, Mr. Wells, when you – tell me this. Explain to the jury what the living arrangements are where you are kept there in CCA in terms of where you are and Mr. Terry and Mr. Holder?

A. I am in 219, Mr. Terry in 220 and Mr. Holder in 215.

[p. 49] Q. You all have separate single cells?

A. Yes.

Q. And I believe you were locked down what, 22 hours a day?

A. Yes, sir.

Q. But you have two hours a day when you can get out in the common area for recess?

A. Yes, sir.

Q. In that common area, is there a door between the men's side and the women's side?

A. Yes, sir.

Q. And is there a little space at the bottom of that door where it is possible to pass notes back and forth?

A. Yes, sir.

Q. Now, on one occasion, Mr. Wells, did you come back into the common area there and find Mr. Holder and Mr. Terry in an argument?

A. In their room, in Mr. Terry's room.

Q. In Mr. Terry's room?

A. Uh-huh.

Q. And tell the jury what was said.

A. Well, when I walked in, Norvell had said that – he said Bobby, you going to mess up yourself. If you speak – you better tell the truth. And if you don't tell the truth, you going to end up getting your momma indicted and your – and Angie.

* * *

**97-6089**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, vs. EARL MORRIS, CHERYL WARD, LARRY TURNLEY & MICHAEL SMITH, Defendants. | Criminal Case # 3-96-00120<br>April 10, 1997<br>9:00 a.m.<br>VOLUME<br>(Filed Apr. 30, 1998) |

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE THOMAS A. WISEMAN, JR.

APPEARANCES:

| | |
|---|---|
| For the Plaitniff: | Robert C. Anderson, Esq. &<br>Larry W. Moon, Esq.,<br>Asst. U. S. Attorneys<br>801 Broadway, 9th Fllor [sic]<br>Nashville, TN 37203 |
| For the Defendants: | Charles R. Ray, Esq.,<br>Martin F. Pinales, Esq.,<br>William C. Roberts, Esq.,<br>Justin K. Johnson, Esq. &<br>Sumter L. Camp, Esq.,<br>Attorneys at Law |
| Official Court Reporter: | John W. Tummel, RPR<br>801 Broadway, Rm. A-839<br>Nashville, Tn. 37203 |

* * *

[p. 28] A. Anywhere from two to 300,000.

Q. When you heard this, what was your reaction?

A. I got real upset.

Q. Why did you get upset?

A. Because it wasn't mine. I had to account for that.

Q. Who did you have to account to?

A. Mr. Earl Morris.

Q. What concerns did that cause you?

A. A whole lot of concerns.

Q. Why?

A. Because I knew if I didn't account for that and pay that my life would be in danger.

Q. Now, between the time that the business venture between you and Michael Smith started and this conversation about the loss of the cocaine, how many shipments of cocaine had you received from the defendant Earl Morris?

A. About three. Two or three.

Q. And what kind of – how large or what size of shipments were you getting?

A. Anywhere from 30 or 40. Started off small. First one was about four.

MR. ANDERSON: Your Honor, could I request from madame clerk, I believe you have Government's [p. 29] Exhibits 6 through 19?

Q. When you met with the defendant Earl Morris during the summer months, June through September, what area of town did you have these meetings in?

A. Like on Brick Church Pike where the hotels is at, over by Trinity Lane, and I believe up – I want to say downtown Nashville, one of the hotels down there.

Q. And you previously have been interviewed by Mr. Hodges and Mr. Donegan about these matters, is that right?

A. Yes.

Q. Were you able to recall as best you could the names of the hotels?

A. Yes. The best I could. Are they all pretty much in the same area? Yes, they are.

MR. ANDERSON: If I could have the Marshal's assistance.

Q. Mr. Terry, I would represent to you the court Marshal handed you what has been marked as Government's Exhibit 17, hotel receipt for the Ramada Inn. You can see that, sir?

A. Yes, I can.

Q. Have you ever seen that before?

A. No, I haven't.

[p. 30] Q. Do you need a minute to look through it?

A. Yes, I do.

Q. Is that the hotel receipt in the name of Mr. Earl Morris at the Ramada Inn?

A. Yes.

Q. Do you recall ever meeting with Mr. Earl Morris at that Ramada Inn?

A. Yes, I do.

Q. What was the purpose of the meeting?

A. I believe this is one of the times that I had got drugs from him.

Q. Now, when you get drugs from him, tell the Court and jury how it works.

A. I would call him. Once I talk to the guys here in Nashville when they are ready to spend their money, I call and put an order in. He sometimes asks me how many I need and I tell him. Then he says, I will see you when I see you. Then within a week or so he will call me when he is here and I go wherever he is at.

Q. How would you receive the drugs? What would they be packaged in?

A. They would be wrapped like that sometimes, in the big blocks like that.

Q. What would you carry them in?

[p. 31] A. Duffel bags or suitcase.

Q. Similar to what you identified yesterday?

A. Yes.

Q. And how soon thereafter would you return with the money for the cocaine?

A. Sometimes within three hours and sometimes within five hours.

Q. How much money were you paying for the cocaine?

A. Sometimes 20, 22 five or 23.

Q. Price vary each month?

A. Yes. Always within that range? Yes. How would you deliver the money to the defendant Earl Morris?

A. Back in the duffel bag or suitcase.

Q. Now, when you would meet Earl Morris, what discussion would you have about how long it might take you to get back with the money?

A. Really don't – he don't really talk that much. He doesn't go off in details like that. Just say, call me when you are through.

Q. And what would you – he was aware you had to have some time to make the sales to collect the money?

A. When I finished, I would call him and he would [p. 32] tell me where to bring the money back to him.

Q. You said when you testified a moment ago you contacted your guys or your distributors. Who else other than Michael Smith would you contact?

A. Quintinia Lewis. When me and him started together.

Q. And this is during the summer months?

A. Yes, sir.

Q. Who was Quintinia Lewis dealing with, if you know?

A. I believe he was dealing with a guy named Cheese and a guy named Burns, and for a little while a guy named Mack.

Q. Would Mack be – did you ever know Mack's name?

A. I think Terrance or something like that. I just called him Mack.

Q. Did you find out Cheese's name?

A. Not until the trial started going on.

Q. You always knew him as Cheese?

A. Just Cheese.

Q. From where you are sitting, do you recognize Cheese or Mack on the diagram here?

A. Yes, I do.

MR. ANDERSON: Perhaps with the Court's [p. 33] permission, he can step down?

THE COURT: Yes, step down and point them out. Turn the chart around so the jury can see it.

A. This is Cheese. That is Mack. This is Burns.

Q. Where is Quintinia Lewis?

A. Right here.

Q. Thank you, sir. Did you ever know Burns as anything other than Burns?

A. No. No, I didn't.

Q. That is the name he went by?

A. Yes.

MR. ANDERSON: If I could have the Marshal's assistance, please.

Q. Mr. Terry, the courtroom Marshal handed you what has been marked Government's Exhibit 16 for the record. You never have seen that before, have you, sir?

A. No, I haven't.

Q. What is it, sir?

A. Like a checkout ticket for Mr. Morris.

Q. Is it from the Days Inn, sir?

A. Yes.

[p. 34] Q. Bear the date August 19, 1994?

A. August 17, '94 on this.

Q. Did you ever meet with the defendant Earl Morris at the Days Inn?

A. Yes, I have.

Q. What was the purpose of that meeting?

A. Pick up drugs.

Q. And what quantity of drugs did you pick up on that occasion?

A. Anywhere from 30 to 40, sometimes more.

Q. Did you follow the same procedure for receiving the drugs and paying the money?

A. Same procedures.

Q. When you – how much money were you paying him?

A. Hundreds of thousands.

Q. How did you carry that much money?

A. With a little help.

Q. Who helped you?

A. Sometimes Quintinia Lewis would help me.

Q. Did Quintinia Lewis ever meet the defendant Earl Morris?

A. No, he didn't.

Q. Why not?

A. I take that back. He came in contact as far as seeing him. He probably seen him more than Mr. Michael [p. 35] Smith did.

Q. Did you ever arrange any meeting between them?

A. No. No.

Q. Whether he saw him or not, you don't know, or what?

A. We – well, neither one, Michael Smith or Quintinia Lewis, I never took them in and introduced them. Quintinia probable [sic] got a little closer than Michael Smith did.

Q. When you would give that much money to the defendant Earl Morris, did you have any conversation about that money?

A. No conversation.

Q. What if anything would be said?

A. See you. Take it easy. Talk to you later.

Q. Would you make arrangements at that time when you would get another shipment?

A. No.

Q. What was understood between you when, if ever, you would need another shipment?

A. Just call.

MR. ANDERSON: If I could have the Marshal's assistance, please?

THE COURT: Yes, sir.

[p. 36] Q. Sir, I represent to you the courtroom Marshal handed you what has been marked Government Exhibit 15 for the record. You have never seen that before, have you, sir?

A. No, I haven't.

Q. Sir, does that purport to be basically a computer printout receipt from the Holiday Inn Express dated December 22, 1994?

A. Yes.

Q. Now, what I want to ask you with respect to when you had these conversations you testified to about the loss of the cocaine, when did that occur with respect to that date of September 22, 1994, on that receipt, if you know?

A. Probably a couple weeks before this. Did you ever meet with the defendant Earl Morris at that time on September 22, 1994?

A. Yes, I did.

Q. What happened at that meeting?

A. Basically I just gave him what money I did have already and we talked about what happened. He was kind of real upset. But he took what I could give him and told me I needed to get the rest of his money together.

[p. 37] Q. Anything else said to you about how much time you had to get the money together or anything such as that?

A. Well, he was real kind of angry, you know, and told me I shouldn't have went out of town, I should have stayed and took care of my business and that he was asking me who all was involved, you know. He didn't go into any details about how long I had or anything like that. He told me I better get his money together.

Q. During the summer months of June, July, August, '94, had you ever seen the defendant Cheryl Ward in the presence of the defendant Earl Morris?

A. Yes.

Q. On the dates or times when you got the shipments of cocaine, was she present?

A. Yes.

Q. What was her role? What was her function?

A. She basically been there sometime or have the kids with her most of the time when I took the money

back. If I stick around for 10 or 15 minutes, she'll start counting the money or something like that.

Q. Who was she working for?

A. Earl Morris.

Q. Was she also romantically associated with him, [p. 38] from your observations?

A. Yes.

Q. What assistance, if any, did she do in making the shipment or arrangements between you and the defendant Earl Morris?

A. Sometimes she would bring me drugs. A couple times she brought me drugs. Most of the time when she is here with him she is basically – would just be with him and just count the money sometimes.

Q. After this loss of the cocaine and this conversation you had on the 22nd of September, 194, did you continue to get regular shipments of cocaine?

A. No. Shutdown.

Q. Why not? What happened?

A. He was still upset with me and he told my cousin, Bobby Holder, that I needed to be working to get his money together and if I didn't get his money together he would do something to me, get me killed or something. At that time I started going back home to Indianapolis and from there I was helping my cousin down there.

Q. Did shipments ever resume here to you in Nashville, Tennessee?

A. Not to me, no.

[p. 39] Q. What happened after the beginning of the year, 1995?

A. I started back.

Q. How did you start back?

A. I had the same meeting we had talked about earlier where I had went to the – I think the Ramada Inn, I believe it was, one of the hotels right there. And Chris Wells was sitting in the car and knocked on the window and told me what room they were in. We were all up in the room talking.

Q. Who all was?

A. My cousin Bobby Holder and Earl Morris.

Q. What conversation did you have with the defendant Earl Morris?

A. Told me he was going to try me again and if I messed up again I was through.

Q. By through, what did he say, or what did you mean?

A. He was going to kill me, have me killed.

Q. Did the shipments resume?

A. Yes. They started back right there.

Q. How many did you get?

A. I think I got like 40. Forty to 44.

Q. Who did you use to distribute the drugs that you [p. 40] were getting?

A. At that time Quintinia Lewis.

Q. Anybody else?

A. No.

Q. How would you contact Quintinia Lewis? How would you reach him?

A. I would either call him – most of the time we would be together once he got off work.

MR. ANDERSON: If I could have the Marshal's assistance, please.

Q. Mr. Terry, the Marshal handed you what is marked Government's Exhibit 13 for the government. Have you ever seen that, sir?

A. No, I haven't.

Q. Can you read that receipt there, sir?

A. Embassy Suites.

Q. Embassy Suites?

A. Yes, Embassy Suites.

Q. Dated January 21, 1995?

A. Yes.

Q. You testified you recalled this meeting being at the Ramada Inn. If you remember or if you know was the Ramada Inn or Embassy Suites Motel close by or in the same area?

[p. 41] A. Most all the motels I met Mr. Morris was in the same area. Sometimes I get confused to going to a

motel I have to ask. They are all in the same area. It is hard to keep up with which one we always met at.

Q. Now, that hotel receipt from the Embassy Suites bearing the date of January 21st, is that on or about the time you had the meeting you just testified about?

A. Yes, it is.

Q. How soon after you got the 40 to 44 kilos after that meeting were you able to return with the money?

A. Later on that day.

Q. Who helped you count the money on that occasion, if you remember?

A. Quintinia Lewis and Ida Thompson.

Q. Where was the money counted at?

A. Her house.

Q. How long would it take to count that much money?

A. With all three of us doing it probably about an hour and a half. Hour, hour and a half.

Q. When you returned with the money, did you just hand it over, or what would you do?

A. Just hand it over.

Q. How was the money stacked up?

A. In $10,000 stacks. Thousand stacks and then [p. 42] thousand dollar bundles.

At that time who was Quintinia Lewis getting the drugs to, if you know?

A. Cheese. Guy named Cheese, guy named Burns.

Q. How about Mack?

A. I was dealing with Mack.

Q. How soon after that did you get another shipment?

A. Probably a little bit right after that.

MR. ANDERSON: If I could have the Marshal's assistance.

Q. The Marshal handed you what has been marked Government Exhibit 11 for the record. Sir, is that a receipt from the Quality Inn or Hall of Fame Motel?

A. Yes, it is.

Q. Is that dated February 4, 1995?

A. Yes, it is.

Q. Did you have a meeting with Mr. Earl Morris on that occasion?

A. Yes, I did.

Q. What was the purpose of that meeting?

A. Picking up some drugs.

Q. Who was present at that meeting?

A. Cheryl Ward, her kids.

Q. How much drugs did you get at that meeting?

[p. 43] A. About the same. Anywhere from 30 to 40 more keys.

Q. Who were the drugs distributed to?

A. Same people. Mack, Cheese, Burns.

MR. ANDERSON: If I could have the Marshal's assistance.

Q. The Marshal handed you what has been marked Government Exhibit 9 for the record. Have you ever seen that before?

A. No, I haven't.

Q. Is that a receipt from the Embassy Suites dated March 14, 1995?

A. Yes, it is.

Q. Did you have a meeting with Mr. Earl Morris on that occasion?

A. Yes, I did.

Q. The purpose of that meeting?

A. Picking up drugs.

Q. How much drugs did you pick up on that occasion?

A. Anywhere from 30 or 40 kilos or more.

Q. How were they distributed?

A. Same person, Quintinia Lewis to Mack, Cheese and Burns.

Q. How were they counted – the money counted?

A. Me, Quintinia Lewis and Ida Thompson.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Case No. 3:96-00120 |
| vs. | ) | Volume VIII |
| EARL MORRIS, et al. | ) | |

---

BEFORE THE HONORABLE
THOMAS A. WISEMAN, SENIOR JUDGE

TRANSCRIPT

OF

PROCEEDINGS

April 18, 1997

---

APPEARANCES:

For the Government:
Mr. Robert Anderson
Mr. Larry Moon
Asst. U.S. Attorneys
110 Ninth Avenue S., Suite A961
Nashville, TN 37203

For Defendant Morris:
Mr. Charles Ray
Attorney at Law
Nashville, TN

For Defendant Smith:
Mr. Sumter Camp
Asst. Fed. Public Defender
810 Broadway, Suite 200
Nashville, TN 37203

PREPARED BY:

CATHY B. LEIGH, RPR
Official Court Reporter
801 Broadway, Room A837
Nashville, TN 37203
(615) 726-3511

* * *

[p. 95] well was Norvell Terry able to recall exact dates, days of the week, days of the month?

A. He is pretty close. He didn't recall exactly the times and the exact days, but he was real close within weeks, months.

Q. And was any diary kept or any journal kept writing down everything by Terry or any of these other people involved?

A. Not to my knowledge. I never saw anything to support that.

Q. Were you able to find all the documents that could possibly exist in this case to support and corroborate Norvell Terry?

A. To the best of my abilities and to the best of Gene Donegan's abilities we found what we thought was all of them. We may have missed some. We don't know.

Q. Thank you, sir.

MR. ANDERSON: I pass the witness. Your Honor, I would just move for admission Government Exhibit 44A through I. Thank you.

THE COURT: They will be received. Thank you.

CROSS-EXAMINATION

BY MR. RAY:

Q. Agent Hodges, it is true, is it not, that standing alone there is nothing incriminating about Earl Morris having checked into this particular motel on these particular dates?

[p. 96] A. Not by itself, no, sir.

Q. And these telephone calls in and of themselves are not incriminating?

A. No, sir.

Q. You have to have a spin that Norvell Terry puts on it and you have to believe Norvell Terry before these particular items corroborate anything, isn't that correct, sir?

A. When we started from square one with no information other than what he gave us, that's all we had to go on to get that documentation, yes.

Q. Is the answer to my question you have got to believe Norvell Terry for –

A. Yes.

Q. – these things to have any corroborative value?

A. Yes.

Q. And you had the ability in your agreement with Mr. Terry to polygraph him at any given time about any given issue to determine whether or not he was being truthful or deceptive, did you not?

A. Yes.

Q. And that was never done, was it?

A. Never polygraphed.

Q. And if we went back through all of these charts – and I am not very mechanically inclined, and I am afraid I would probably have them all in the floor – the same goes for each [p. 97] and every thing you pointed out that in order for these telephone calls or these records to have any meaning, you have to believe Norvell Terry and the spin he puts on them, isn't that correct, sir?

A. The spin? I wouldn't say the word spin, but I believe what he told us at the time to get the documentation, yes.

Q. Well, it is obviously you believe him because you have never polygraphed him, have you?

A. No, sir.

Q. Now, if Norvell Terry has the ability to manipulate the testimony of Quintinia Lewis, Melissa Spangler, Bobby Holder then there isn't much corroboration there, is there, sir? In other words, if Norvell Terry has the ability to tell Bobby Holder I want you to testify to these facts that support what I have said, that wouldn't corroborate much, would it, Agent Hodges?

A. I guess not.

Q. So if Norvell Terry had the ability to orchestrate, manipulate, control these other witnesses that have come in here and give them, so to speak, the party line, there isn't much corroboration there, is that correct?

A. Well, If you think he did that.

Q. Well, it not for what I think. It is for what these folks think.

MR. RAY: That's all I have, Your Honor.

* * *

**97-6089**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>EARL MORRIS, CHERYL WARD, LARRY TURNLEY & MICHAEL SMITH,<br>Defendants. | Criminal Case<br>#3-96-00120<br>April 10, 1997<br>9:00 a.m.<br>VOLUME<br>(Filed Nov. 21, 1997) |

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE THOMAS A. WISEMAN, JR.

APPEARANCES:

For the Plaintiff:
Robert C. Anderson, Esq. &
Larry W. Moon, Esq.,
Asst. U. S. Attorneys
801 Broadway, 9th Fllor [sic]
Nashville, TN 37203

For the Defendants:
Charles R. Ray, Esq.,
Martin F. Pinales, Esq.,
William C. Roberts, Esq.,
Justin K. Johnson, Esq. &
Sumter l. Camp, Esq.,
Attorneys at Law

Official Court Reporter:
John W. Tummel, RPR
801 Broadway, Rm. A-839
Nashville, Tn. 37203

* * *

[p. 18] Bring them in, please.

(Whereupon, the jury entered the courtroom.)

THE COURT: Be seated, ladies and gentlemen.

Mr. Anderson, you may continue your direct examination of Mr. Terry.

Mr. Terry, you are still under oath.

A. Yes, sir.

[p. 19] EXAMINATION OF NORVEL TERRY

by Mr. Anderson:

Q. Mr. Terry, when we concluded yesterday, we had finished a series of questions about the transaction in April of 1995 that resulted in the arrest of Melissa Spangler and you surrendering and you are to custody.

Do you remember those questions?

A. Yes, I do.

Q. Mr. Terry, let's go back to the beginning.

When was it that you moved to Nashville, Tennessee?

A. Around, I believe, like June. May or June of '94.

Q. Before actually moving here to Nashville, Tennessee, had you made trips from Indianapolis, Indiana to Nashville?

A. Yes, I had.

Q. About how many times had you visited Nashville?

A. Probably about three times. I was from a motorcycle club called Naptown Riders and I came down her.

Q. During your visits here to Nashville, Tennessee, did you meet any other people here that were in this motorcycle club?

* * *

**EXHIBIT A**

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | No. 3:96-00120 |
| v. | ) | Judge Wiseman |
| MICHAEL SMITH, et al. | ) | |

**AFFIDAVIT**

STATE OF TENNESSEE )
COUNTY OF DAVIDSON )

Personally appeared before me, the undersigned, a notary public in and for said county and state, Ann Card, who having been duly sworn and according to law does make oath as follows:

1. On April 23, 1997, Ann Walker-King and I went to the CCA facility at 5115 Harding Place, Nashville, and met with Marcus Anthony "Bobby" Holder. This visit was in response to two messages I received on April 22 that Mr. Holder needed to see me.

2. The first thing Holder said to us was that the prosecutor was mad at him, and looked to us for confirmation. We said we did not know.

3. Mr. Holder said that when he, Terry, and the other prisoners first arrived at the CCA facility, he talked to Norvel Terry about wanting protection if he testified. Terry said that he would talk to the agents about it.

4. A few days after they arrived at CCA, Robert Anderson and Gene Donegan came to talk to Norvel Terry. Terry came back to Holder and said that the agents have him a packet of paperwork. He read to Holder his own statement. Holder responded that he had never met Six Pack, had never seen him. Terry told Holder to say he knew Six Pack. He told Holder he had to say he knew him. Terry described Six Pack to Holder, dark black skin, white eyes, approximate height and size. Terry told Holder to follow the lead of the person who is asking the questions, which would be the prosecutor during the trial. Terry practiced this with Holder and Chris Wells.

5. The next day Gene Donegan and Robert Anderson came to see Marcus Holder. Holder said he did not want to testify, that he was afraid. They told him it was a part of his bargain that he had to testify. Holder told them it was dangerous. They wanted to talk about the time Holder came to Nashville, met Earl Morris here and they subsequently went to Las Vegas. Holder said he got into town and there were two motel rooms and Morris was not there. Morris got back later and he and Holder left for Las Vegas. During this interview Donegan asked Holder if somebody else was there. Holder said there was not. Donegan said yes there was. Holder said there was not. Donegan said there was. Holder finally told Donegan that there was, simply going along with him. Holder said it should have been obvious to Donegan and Anderson that he was just playing along with their cues and their lead. It occurred to Holder that this is what Terry had been preparing him for, familiarizing him with Terry's statement so that Holder would tell the agents the same thing.

Donegan was pushing very hard. Anderson was just sitting there. Donegan also kept insisting that Holder gave Morris one hundred thousand dollars ($100,000) to cover the stolen drugs and to keep Morris from killing Terry. Holder kept saying that did not happen and Donegan said that it did. Holder finally went along with Donegan's lead on that question and said that it happened.

6. When Holder was in the Federal Courthouse waiting to testify, he told SA Dan Holdges that he was not going to lie. Because he told them he was not going to lie, they did not ask him about the incident in which Terry claimed Holder was present during a drug transaction that involved Six Pack (Michael Smith).

7. Holder told us that during his testimony, Robert Anderson asked him if he gave Earl Morris $100,000 [to cover the stolen dope and not kill Terry] and he said that he did. Holder told us during this interview that was a lie, but that it was the only lie he told on the stand. He said that the prosecutor snuck the question in on him, he was not expecting it, and answered before he could really think about it. Holder also told us that he admitted this lie to Charlie Ray when Charlie met with him prior to re-cross examination.

8. Donegan told Holder and Wells, while they were in the holding cells waiting to testify, that after they testified they would get a big recommendation. He also told them not to mention the Utah arrest or Utah jail.

9. Holder told Anderson that Morris had never threatened him or Terry.

FURTHER AFFIANT SAITH NOT.

/s/ Ann Card
ANN CARD

Sworn and subscribed to me before me
this 29th day of April, 1997.

/s/ Cheryl Stewart
NOTARY PUBLIC

My Commission Expires: 3/25/2000

97-6089

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ] | |
| VS. | ] | |
| EARL MORRIS, et al., | ] | CASE NO.: |
| Defendants. | ] | 3-96-00120 |
| | ] | |

---

TRANSCRIPT OF PROCEEDINGS
April 11, 1997 – 9:00 a.m. – Morning Session

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BEFORE THE HONORABLE SENIOR JUDGE
THOMAS A. WISEMAN, JR., DISTRICT JUDGE

---

APPEARANCES:

| | |
|---|---|
| For the United States of America: | ROBERT C. ANDERSON<br>LAWRENCE W. MOON<br>Assistant United States Attorneys<br>961-A U. S. Courthouse<br>Nashville, Tennessee 37203 |
| For the Defendant Morris: | CHARLES R. RAY<br>Attorney at Law<br>211 Third Avenue North<br>Nashville, Tennessee 37219 |

CHARLOTTE H. BARR, RPR
Official Court Reporter
837-A U.S. Courthouse
Nashville, Tennessee 37203

* * *

[p. 34] affair?

A. Never had an affair with her.

Q. You never had an affair?

A. No, I haven't.

Q. Well, Mr. Terry, you knew that Ms. Crocker had had her husband arrested and charged with assault?

A. Yes, I do.

Q. And that the allegations also involved a claim by her that he had made her have sex without her consent?

A. Right.

Q. And you called her in a conversation that you tape recorded to talk to her about going to meet with your attorney, Mr. Kern; is that correct?

A. Yes.

Q. And that is the same attorney who represented you in this case?

A. Right.

Q. Mr. Kern?

A. Right.

Q. And in that conversation you told Ms. Crocker that the purpose for her to go to the attorney was that so when she was called to court as the victim and witness in that prosecution, that she could take the Fifth Amendment and not have to testify against her husband; isn't that right?

A. No, it isn't, sir.

[p. 35] Q. You did not suggest to Ms. Crocker that she meet with your lawyer so she can take the Fifth Amendment and go into court on that tape-recorded conversation?

A. No, I didn't.

Q. Did you suggest to her if she appeared as a witness in that case that you would get dragged in it and have to reveal the affair you were having with her to her husband?

A. No.

Q. Did you tell her if she pursued that prosecution that there were other witnesses to testify about her sleeping around town that would also come out?

A. No.

Q. Did you in the course of that conversation provide her with information where she came back on the phone and told you that she had slit her wrist?

A. I can't recall none of that at all; I can't recall none of that.

MR. CAMP: May I have a movement, Your Honor?

THE COURT: Yes, sir.

MR. CAMP: Your Honor, may we approach the Bench?

THE COURT: Ladies and gentlemen, step back to the jury room, will you, please.

(WHEREUPON, at 10:08 a.m. the Jury retired from open court, after which the following proceedings were had:)

[p. 36] MR. CAMP: Your Honor, before we get into the discussion, may I also ask the witness be removed from the courtroom?

THE COURT: Yes, sir. Take him out.

(WHEREUPON, the witness exited the courtroom, after which the following proceedings were had:)

MR. CAMP: In light of the Court's ruling yesterday, I did not want to put myself in the position I found myself before. Now that Mr. Terry said he doesn't recollect that, I would like to ask him if hearing the tape would refresh his recollection. I did not want to do that in the presence of the Jury.

THE COURT: Mr. Moon?

MR. MOON: May I have a moment to look at the rules?

THE COURT: Yes, sir.

MR. MOON: Thank you. The rule says the specific instances of the conduct of the witness for attacking the witness' credibility other than conviction of a crime – and I think we would focus on the following words: "may not be proved by extrinsic evidence." That was the foundation of your ruling yesterday.

THE COURT: Yes, sir, and that was before he lied about it, Mr. Moon.

MR. MOON: Yes, sir. In one previous case in Louisiana when I was AUSA down there a witness was – [p. 37] plausibly appeared to have said something contrary to what he had said before. And the Court ruled that even so, that was a matter to be taken up on another day and the evidence itself could not come in because the rule would not allow proof of the conduct.

THE COURT: Mr. Moon, this man's credibility is central to this case.

MR. MOON: Yes, sir. I am not pleased to be making this argument.

THE COURT: I understand.

MR. MOON: Yes, sir.

THE COURT: All right.

MR. MOON: I am not pleased to be up here.

THE COURT: I understand. Yes, I will allow you to play the tape and refresh his recollection.

MR. CAMP: Thank you, sir.

THE COURT: In its entirety. It takes about a hour, doesn't it?

MR. CAMP: Yes, sir.

MR. MOON: Judge, you will allow that outside of the hearing of –

THE COURT: No, sir, I am going to let the Jury hear it.

MR. MOON: Yes, sir.

THE COURT: Yes, sir, you messed up, Mr. Moon. All [p. 38] you had to do is tell that man to admit what he had done and that would have been the end of it, but he has gotten up here and lied about it now under oath. I am going to let that go to his credibility as to whether or not anything else he said ought to be believed. That is just a monumental foul-up in your case.

MR. MOON: May I say to you, Judge, that what it really shows is Mr. Anderson and I – neither Mr. Anderson nor I said anything to him.

THE COURT: You had that opportunity, and it would have been perfectly all right for you to talk to him about what had come in, yes, sir.

MR. MOON: We didn't know that.

THE COURT: I gave you an opportunity – I gave you a recess to let you talk to him yesterday.

MR. MOON: Oh, I'm sorry, we didn't understand that.

THE COURT: I said, "Do you want to go talk to your witness?"

And you said, "Yes." And I recessed for half an hour.

MR. MOON: I am sorry, I didn't hear that for the witness, Judge. I thought you asked for a recess to talk among ourselves.

THE COURT: No, I said, "Do you want to go talk to your witness and see if he ever had such a conversation?" And [p. 39] I gave you a 30-minute or 45-minute, I believe, recess for you to do that.

MR. MOON: Neither Mr. Anderson nor I understood that, Judge, and we would never have done that without such an understanding. I am sorry. Of course, the burden is always on us, and I just didn't hear you say that.

MR. ANDERSON: I don't know what to say. I certainly didn't understand that, either. I understood that we had time to discuss amongst ourselves a response we would have to the defense request.

THE COURT: We don't have the same Court Reporter here today, but I know I said, "Do you want to go talk to your witness?"

MR. ANDERSON: Yes, sir.

THE COURT: We will be in recess.

(WHEREUPON, a recess was taken, after which the following proceedings were had:)

MR. MOON: Judge, I would ask the Court in its ruling – and again I say I am not pleased to be here, but again in its ruling that the Court make a determination that if it were the Defendant or one of them on the stand and this tape were of the same nature and the same questions had been asked, if the Court would allow the introduction of the tape and playing of the tape.

THE COURT: Mr. Moon, let me tell you the basis of [p. 40] my ruling. This matter, as you know, came to light after the normal discovery processes had taken place. Had they known of it beforehand, it would have been required to have been discovered and you would have had full notice of it and you would have had the opportunity to talk to your witness about it – "Did this

occur; whose voices are those on it," and so forth. Then when I heard it and made the determination to allow it under 608(b), I gave you the opportunity to go out and talk to your witness about it so you could cross-examine Mr. Brown about it and do whatever you had to do in this instance.

And that is why I said what I said about talking to your witness. It would not have violated the sequestration rule, 615, for you to have done so, because it was discoverable material. And that was the reason I said what I said about you may go talk to your witness about it.

But, as I say, now that he has made directly contradictory responses to the questions, it goes to his credibility as a witness. He has, in this Court's opinion, perjured himself. So I am going to allow them to display that to the Jury for whatever it's worth.

MR. MOON: Thank you, and thank you for entertaining the Government's argument.

THE COURT: Yes, sir. Mr. Camp?

MR. CAMP: May we have a moment to make sure the

* * *

UNITED STATES DISTRICT COURT

EASTERN District of KENTUCKY
COVINGTON

UNITED STATES OF AMERICA

V.

CHERYL ANN WARD

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

Case Number: 94-90
(Filed May 2, 1997)
WILLIAM E. JOHNSON
Defendant's Attorney

**THE DEFENDANT:**

[ ] pleaded guilty to court(s) _____

[ ] pleaded nolo contendere to court(s) _____ which was accepted by the court.

[X] was found guilty on court(s) 1 after a plea of not guilty.

BY _____
DEPUTY CLERK

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21§ 841 (a) (1) | Possession w/intent to distribute cocain | 11/30/94 | 1 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are full paid.

Defendant's Soc. Sec. No.: 553-98-0041

Defendant's Date of Birth.: 11/5/55

Defendant's USM No.: _____

Defendant's Residence Address:

733 West 130th Street
Gardena, CA 90247-1705

Defendant's Mailing Address:

_____

_____

May 28, 1996
Date of Imposition of Judgment

/s/ William O. Bertlesman
Signature of Judicial Officer

WILLIAM O. BERTLESMAN, CHIEF JUDGE
Name and Title of Judicial Officer

MAY 28, 1996
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of TWO HUNDRED FORTY (240) MONTHS

X The court makes the following recommendations to the Bureau of Prisons: A facility in California.

X The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at ____ a.m./p.m. on _____.
___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.
___ as notified by the United States marshal.
___ as notified by the probation or pretrial services office.

## RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| Count | Assessment | Fine | Restitution |
|---|---|---|---|
| 1 | $50.00 due immediately | | |

[ ] If applicable, restitution amount ordered pursuant to plea agreement .....$ _____

| Totals: | $ 50.00 | $ _____ | = $ | $50.00 |
|---|---|---|---|---|

## FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

## RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | *Total Amount of Loss | Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|
| Totals: | $ ___ | $ ___ | |

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses

## STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary): The Court counted 11.90 and 38 keys from April 1995 = total 49.90 for a total relevant conduct.

**Guideline Range Determined by the Court:**

Total Offense Level: 36

Criminal History Category: II

Imprisonment Range: 210 to 262 months

Supervised Release Range: 5 yrs to ---------- ~~years~~

Fine Range: $20,000 to $4,000,000

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $N/A

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines. To promote respect for the law & provide just punishment, and act as a deterrent to future criminal activity. The

deft. is a big-time drug dealer, but the sentence is just for crime; A sentence of 240 mos. is sufficient and justified.

**OR**

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

**OR**

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

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